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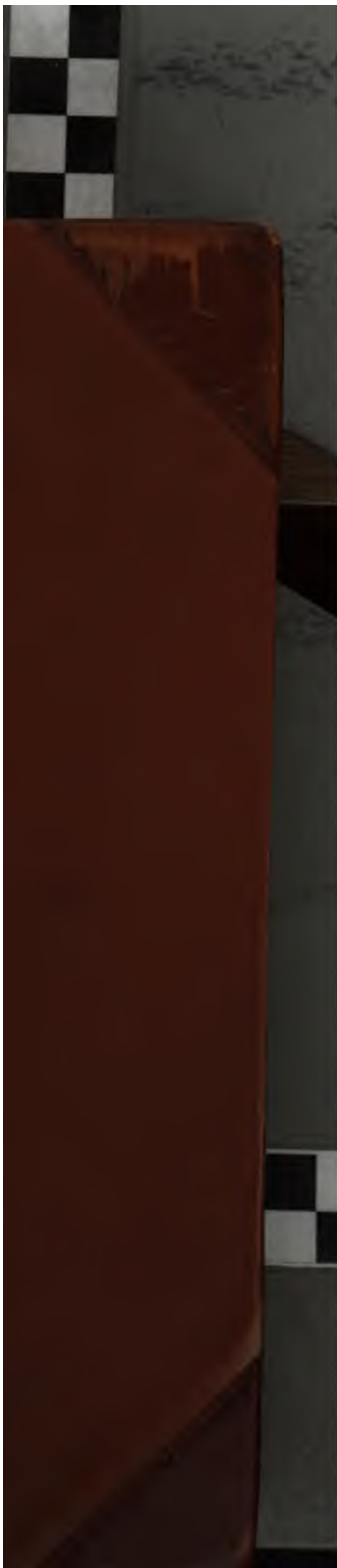
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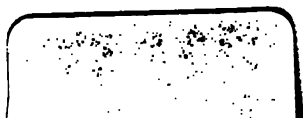
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CASES
DECIDED
IN THE SUPREME COURT
OF THE
CAPE OF GOOD HOPE,

AS REPORTED BY THE LATE
HON. WILLIAM MENZIES, ESQUIRE,
(SENIOR PUISNE JUDGE OF THE SUPREME COURT.)

EDITED BY
JAMES BUCHANAN,
ADVOCATE.

VOL. I.



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IN accordance with the plan of the late Mr. Justice MENZIES, the Provisional Cases—or, at least, a sufficient number of them to illustrate the doctrine and practice of Provisional Sentence—form the first portion of this work. The division into “Documents sufficient for Provisional Sentence,” “Documents insufficient,” “Defence,” and “Summons and its Requisites,” is that which was contemplated by the learned Judge in his intended publication. Under these heads the subjects are alphabetically arranged; and the cases on each subject follow in order of date. It has been thought advisable to prefix some Remarks on Provisional Sentence, for the information of those unacquainted with the system. Several Provisional Cases, in which questions more conveniently coming under other heads of Law are decided, will be found in the subsequent parts.

BOOK I.

PROVISIONAL SENTENCE.

**CHAP. I.—DOCUMENTS SUFFICIENT PER SE TO SUPPORT
A CLAIM OF PROVISIONAL SENTENCE.**

II.—DOCUMENTS PER SE INSUFFICIENT.

III.—DEFENCE AGAINST PROVISIONAL CLAIM.

IV.—SUMMONS AND ITS REQUISITES.

PREFATORY REMARKS

ON

PROVISIONAL SENTENCE.

§ 1. Provisional sentence is a decree of the Court in favour of a creditor on a written undertaking or acknowledgment of debt, signed by the debtor,—the terms of which undertaking must be clear and definite, evidencing a liquid liability. After due summons of the defendant to acknowledge or deny his signature (a copy of the instrument being served with the summons), if he does not appear on the return day, or, if appearing, he does not deny his signature, this decree is granted on the mere production by the plaintiff of the document on which provisional sentence is claimed, the genuineness of the document being presumed, and the signature held to be acknowledged in default of denial.

§ 2. Founded, however, entirely on the presumption of the genuineness of the documents produced to the Court, and of their legal validity, provided only that this validity appear *ex facie*, this decree is not definitive; and by the judgment of the Court, provision is made that the plaintiff shall not be entitled to payment or execution, unless he give adequate security, that, if it should appear on the merits, or, to use the technical language of our law, in the principal case, that the debt on account of which provisional sentence was claimed was not legally due, restitution in full should be made to the defendant of the amount of the judgment and costs. Hence, the terms *Provisional Sentence*, as denoting that the sentence might be set aside by further proceedings in the same suit, and *Fiduciary Solution*, in reference to the security of restitution.

§ 3. The system of granting provisional judgment on the production of such strong *prima facie* proof of debt as is afforded by a clear written acknowledgment of debt, or written undertaking of payment, was in practice in Holland towards the close of the sixteenth century. In the neighbouring countries, in parts of France especially, the same system had been for some time in force; and there, though

originally only on notarial obligations, a similar kind of summary judgment, pending the decision on the merits which might afterwards be inquired into, was given by the name of "*Garnissement de main*."* Hence is derived the term "*Handruiling*," by which provisional payment is often designated in Dutch jurisprudence; while the yet more common expression, "*Provisie van Namptissement*," points equally to the French origin of the practice,—"*namptissement*" signifying payment under security, or rather the security itself (*pignus*), into which the plaintiff is compelled to enter, in order to ensure repayment to the defendant, should the final sentence so adjudge.

§ 4. The Ordinance of Judicial Procedure in Holland (*Ordonnantie van Justitie binnen de Steeden ende ten Platten Lande van Holland en West Friesland*, dat. 1 April, 1580), prescribed the Dutch practice which prevailed in this colony until the establishment of the Supreme Court; and as this practice, forming, in fact, in relation to provisional cases, a part of the law of Holland, and consequently of the Colonial law, has, as far as provision is concerned, been adopted by the Court, and with the necessary modifications embodied in its rules, a portion of the 3rd Article of this Ordinance, showing the nature and effect of a provisional claim, will not be misplaced here:—

"If the defendant, having been duly summoned to acknowledge or deny his obligation (in writing), written acknowledgment of debt, or other letters obligatory or instrument of mortgage, and to answer to the claim of *namptissement*, do not appear on the day appointed, the effect of the first default shall be granted against him, by virtue of which the aforesaid writings shall be held as acknowledged, and the defendant be condemned to pay into the hands of the plaintiff, the monies appearing due by the obligation, under caution *de restituendo*."†

* Art. 430 of the Coutumes d'Orleans:—"Lettres obligatoires faites et passées sous le seel Royal, ou autre seel authentique de cour laye sont executoires, et portent garnissement de main contre l'obligé, en baillant par le créancier, bonne et suffisante caution." To which article Pothier has the following note:—"C'est-à-dire que lorsque quelqu'un s'est obligé par un contrat à payer une somme certaine et liquide, quelques moyens qu'il allègue contre son obligation sur l'opposition par lui formée au commandement qui lui est fait de payer, il doit, s'il ne rapporte quittance, garnir la main du créancier; c'est-à-dire qu'il doit être condamné à payer par provision la somme portée au contrat." These Coutumes were reduced to writing in 1509, by order of Louis XII., and revised in 1583, under Henry III. The acts passed "sous le seel Royal ou autre seel authentique de cour laye" are notarial deeds passed by notaries of the Royal Courts, and those of the "Seigniorial Courts."—Pothier: *Coutumes d'Orleans* Tit. XX.

† Vide also Articles 1, 6, and 10, of the Ord. van Justitie, and Art. 119 of Instructie van den Hove.

§ 5. On the denial of his signature, or of his deed, by the defendant, the plaintiff may proceed to immediate proof, or, if unprepared with immediate proof, may take a day, within some reasonable time, to establish the same, the Court, in their discretion, having the power to inflict some penalty, such as double costs, for any *malá fide* denial of signature.* This having been done, and no defences being admitted to bar the provisional claim, except those of the nature hereafter mentioned, the judgment of payment under security is given in like manner as on non-appearance, or admission of the signature or deed.

§ 6. What documents have been held by the Supreme Court sufficient, and what insufficient, to warrant plaintiffs in applying for this summary judgment, will sufficiently appear from the first and second divisions of the cases under the head "Provisional Sentence." The *principle* of the Dutch law has been adhered to in all its strictness; liquid proof in writing of a debt due has been required,—although the different circumstances of the colony have occasioned a different interpretation of some instruments, for instance, of a Bank cheque;† and documents acknowledging a debt, but not expressing any consideration, have also been held entitled to this privilege, to which in Holland they were not generally held entitled. On the other hand, for a like reason, while in Holland the account-books of a merchant, strictly and regularly kept, showing a debt due, were, from their strictness and regularity, considered of the same liquidity as if they purported to bear the debtor's signature,—this privilege accorded to merchants, an exclusive and dominant class in a purely commercial country, has never been acknowledged here; and no case occurs in which provisional sentence has been granted on merchants' account-books, however regular and apparently correct the method of entry may have been. By consulting the references to Dutch authorities given below, the reader may compare the differences in practice, though not in principle, which have arisen.

§ 7. A more considerable difficulty than to decide whether, from the tenor of the document itself, provisional sentence ought to be granted or refused, is to know when an extraneous defence is to be admitted. Of this question the first and second divisions afford occasional examples; but the third has been more especially devoted to its elucidation. Among Dutch lawyers, the extreme advocates of the provisional system would admit no extraneous defence, excepting by the production of

* Instructie van den Hoogen Raad, § 208.

† *Vide Berrange v. De Villiers, and Rens v. Smith*, pp. 12, 13.

documents equally liquid with those on which provision is sought, *i.e.*, on the production of a receipt in answer to the claim on an acknowledgment of debt; while the opponents of the system contended that the most trivial allegations tending to impeach the liquidity of the document sued on should immediately stay the provision. One of the latest writers on the old Dutch law, Van der Keessel, in his *Theses*,* says, "*Fiduciariæ solutionis judicio recte opponi posse videtur æquè liquida à parte rei probatio non solum instrumentis, sed et testibus faciendâ*," and refers to Van der Linden's Judicial Practice,† where the rule of defence is thus laid down:—"In order to oppose a decree of provisional payment, the defendant must be prepared with such counter proofs as shall satisfy the Court that the probability of success in the principal case is against the plaintiff;" and this author proceeds to say that these counter proofs may be documentary or otherwise,—but they should be sufficiently strong to produce a well-grounded conviction in the mind of the Court. The usual mode of proceeding, in defence, in the Supreme Court, where there is not documentary counter proof, is to bring the facts, which it is believed are sufficient to bar or stay the provision, to the notice of the Court by means of affidavits, which, though not in themselves admitted as proving the facts set forth in them, are yet solemn statements, and as such are presumed to contain true allegations,—so that, if the Court consider that these allegations, duly proved in the principal case, would ensure a judgment for the defendant, and if they cannot be answered or explained by the plaintiff, provisional sentence will not be granted. The effect of a successful defence is either that the provision is refused with costs, or without costs, the plaintiff being then directed to proceed in the principal action, the circumstances of each case guiding the discretion of the Court in this particular.

§ 8. Where provisional sentence has been granted, the defendant may, after having satisfied the judgment and obtained security of restitution, if his grounds of defence appear to him sufficient, enter a formal appearance to answer the action. In this case, the summons for provision will stand as the summons in the action, and, as in all simple original actions, a declaration must be filed, and the further pleadings proceeded with, as provided in the 18th and following rules of the Supreme Court. In like manner, where provision has been refused, the summons will stand as the summons in the action, and the proceedings take place as if provisional

* Thes. 526.

† Van der Linden, *Judiciele Practyk*, vol. 1, p. 207.

sentence had never been claimed. In the Dutch practice, the early proceedings in an action, in which the plaintiff might be entitled to provision, where the same as in all other actions; but where the documents sued on were such as to warrant a claim for provisional judgment, this claim was annexed to the "citation" which commenced the action, and granted or refused as an incident in the principal case, which might then be proceeded with, or not, at the option of the parties.*

§ 9. There are other interlocutory proceedings to which the term "provision" is also applied in Dutch law, such as in bastardy cases, "provisional maintenance of the child," pending the investigation, in cases of separation and divorce, "provisional alimention," and "provisional immission into possession," &c., in possessory cases;† but the term is here limited to provisional payment of liquid obligations.

§ 10. For further elucidation of the Dutch doctrine and practice of provisional sentence, the following authorities may be consulted with advantage:—Schorer's Notes to Grotius' Introduction to Dutch Jurisprudence, L. III, c. 5, § 7; Wassenaar's *Practyk Judicieel* (Judicial Practice), c. VI; Merula's *Manier van Procedeeren* (Mode of Proceeding), L. IV, t. 33, c. 3, and IV, t. 37, c. 2, and the Notes; Sande's *Decisiones Frisizæ*, L. I, t. 8, def. 3; the Ordinance of 1st April, 1580, with Notes by Van Leeuwen and others; Van Leeuwen, *Censura Forensis*, Pars. II, L. I, 24, 8, L. I, 25, 9, &c.; Voet ad *Pandectas*, XLII, 1, 6—16; Van der Linden's *Judicieel Practyk* (Judicial Practice), vol. 1, b. 2, c. 6, § 13 (p. 206 seq.); Van der Keessel, Th. 526, 527, 528; &c.‡

☞ For the sake of convenience and immediate reference, the 12th Rule of the Supreme Court, relating to provisional sentence, is annexed,—

"XII. In all cases, where, by law, any person may be summoned to hear claim made for obtaining a *provisional* sentence, or condemnation, for payment, under security, a copy of such instruments or documents upon which the claim

* Van der Linden's *Institutes*, 3: 1, 2, § 12, p. 407.

† Van der Linden's *Jud. Pract.*, vol. 1, p. 207.

‡ While there is nothing analogous to provisional sentence in the English law, the proceeding, by which summary execution is permitted on bills of exchange and promissory notes in Scotland, by the Acts 1681, c. 20, 1696, c. 36, and 12 Geo. III, c. 72, § 56 (made perpetual by 23 Geo. III, c. 18, § 55), seems founded on the same principles (*vide* Thomson on Bills, chap. I and VII.)

for provisional sentence is grounded, shall be served on the person summoned, together with a copy of the said summons; and the said summons shall be, as near as is material, in the form following, that is to say:—

“VICTORIA, &c.

“Command C. D., of street, Cape Town, merchant, that justly, and without delay, he render to A. B. the sum of sterling, of lawful money, which he owes to the said A. B. upon and by virtue of a certain promissory note, [*or other instrument,—describing it,*] bearing date the day of , in the year of Our Lord , signed by the said C. D. [*or signed by and endorsed by the said C. D. as the case may be,*] together with the interest thereon, from the day of , as it is said; and unless he shall do so, then summon the said C. D. that he appear before our Justices of the Supreme Court of our said colony, at Cape Town, on the day of next, at ten o'clock in the forenoon, to show wherefore he hath not done it, and also to acknowledge or deny his handwriting [*or signature*] affixed to the said promissory note, [*or other instrument, as the case may be,*] or the validity of the said debt: and also summon the said C. D. then and there to plead to the provisional claim of the said A. B. for payment thereof, under security, and to join issue thereon; and serve on the said C. D. a copy of the said promissory note, [*or other document, &c.*] whereon the said provisional claim is founded; and return you then there this summons, with whatsoever you have done thereupon. Witness Sir JOHN WYLDE, Knight, LL.D.,” &c.

The following is the usual form of Security Bond:—

“Know all men by the presents, that I, E. H., of Cape Town, am held and firmly bound to C. L. W., of Stellenbosch, in the sum of £ , to be paid to the said C. L. W., his executors, administrators, or assigns, for which payment to be well and truly made I bind myself, my heirs, executors, and administrators firmly by these presents. Signed with my hand this day of , 18 . Whereas A. B. did, by sentence of the Supreme Court, dated , recover provisionally against the said C. L. W. the sum of £ , with interest and costs, by him about his suit in that behalf expended; and whereas the said C. L. W. hath required security for the restitution thereof, if in the principal case the said sentence shall be reversed: Now, the condition of this obligation is such, that if the said sentence shall, in the principal case, be reversed, the abovenamed E. H. do and shall pay to the said C. L. W., his heirs, executors, and administrators, the said first-mentioned sum of money, or such part thereof as the Supreme Court may decree; or if the said provisional sentence shall be confirmed, then, and in either of the said cases, this Bond to be null and void; otherwise to be and remain in full force and virtue.”

BOOK I.

PROVISIONAL SENTENCE.

CHAPTER I.

DOCUMENTS SUFFICIENT PER SE.

1. ACCOUNT-CURRENT—SIGNED BY DEFENDANT.
 2. — ACKNOWLEDGED AS CORRECT.
-

1. RUSSOUW'S TRUSTEES *v.* BECKER.

[12th July, 1847.]

Account-current signed by Defendant sufficient to support Provisional Claim for the Balance against him.

In this case the Court (the Chief Justice *dubitante*) gave provisional sentence as prayed for the balance of an account-current, which account was stated in the summons to be signed by the defendant, and in which he was called upon to confess or deny his signature. The account was produced bearing the defendant's signature, and in it the balance sued for was brought down as due by the defendant.

Russouw's
Trustees
v.
Becker.

The summons also averred that the account was in the handwriting of the defendant, but the judgment of the majority of the Court was not to any extent founded on this averment, but solely on the signature of the defendant to the account.

2. MILLER *v.* PROCTOR.

[25th November, 1847.]

An Account signed by the Defendant as "correct," sufficient to support Provisional Claim.

The Court (Chief Justice *dissentiente*) gave provisional sentence for £73 1s. 6d., being the amount of an account for

Miller *v.*
Proctor.

Miller
v.
Proctor.

articles of wearing apparel supplied, and money advanced, by plaintiff to defendant, in respect that at the foot of the account the words "correct" and "James Proctor" were written, and alleged to be written by the defendant, who had been summoned to confess or deny his said signature, and failed to appear.

-
1. BANKER'S CHEQUE—FORMERLY INSUFFICIENT.
 2. ———— NOW SUFFICIENT.
-

1. BERRANGE v. DE VILLIERS.

[8th August, 1837.]

Provisional Sentence refused on a Cheque.

Berrange
v.
De Villiers.

The Court refused provisional sentence which was claimed by Berrange, as indorsee, from the defendant, the drawer, on the following cheque or order:—

"No. 7. Cape of Good Hope, 23d March, 1837.

"To the Cashier of the Discount Bank.

"Pay John Campbell, Esq., or order, on demand, the sum of £30 or Rds. 400, which place to the account of

"£30—Rds. 400. "J. G. DE VILLIERS.

(Indorsed) "JOHN CAMPBELL."

The summons set forth that the said cheque or order had been duly protested at the instance of the plaintiff, the holder thereof, against the parties concerned, for non-payment and for recourse; and the Sheriff's return set forth that a copy of the protest had been served on the defendant.

The Court refused provisional sentence against defendant, who did not appear, on the ground that the cheque contained no acknowledgment, nor even *primâ facie* evidence that the defendant had ever been indebted to Campbell in the amount of the cheque or any part thereof, and also that there was no evidence that plaintiff was an onerous indorsee, even if his being so would have rendered the defendant, the drawer, liable to him, although not to the original payee (*vide next case*).

2. RENS v. SMITH.

[1st February, 1850.]

Provisional Sentence granted on a Cheque.

Provisional sentence was claimed in this case as stated in the summons upon and by virtue of a certain cheque or draft, dated 8th August, 1849, drawn by the defendant, James Smith, upon the cashier of the Port Elizabeth Bank, and thereafter delivered to the plaintiff, Rens, for valuable consideration, which cheque or draft not having been paid by the cashier of the said Bank, though for that purpose to him presented, has been duly protested for non-payment.

Rens
v.
Smith.

The plaintiff put in the cheque, which was as follows:—

“Port Elizabeth, August 8, 1849.

“To the Cashier of the Port Elizabeth Bank.

“Pay to Mr. James Smith, or bearer, twenty-five pounds.

“£25.

“J. SMITH.”

The protest was also put in.

The defendant did not appear.

The Court, in respect of the decision in the case of *Berrangé v. Villiers* (*supra*, p. 12), at first doubted whether provisional sentence could be granted on such a document *per se*.

But after hearing Ebdon, for the plaintiff, and having considered the law and practice in similar cases in England and Scotland, the Court came to the conclusion that, considering the manner in which such cheques are now made use of in the general transactions of business in this colony, the fact of the drawing and delivering of such a cheque may fairly be deemed to imply an acknowledgment on the part of the drawer that the cheque was so drawn and delivered, in consideration of value received for it by the drawer, and determined that in future they would give the same effect to such cheques as if the words “*for value received*” were expressly inserted in them.

The Court were much influenced by the fact that it is a constant practice in this colony for debtors to pay their debts by means of such cheques, and on delivering the same to receive from their creditors a receipt for the amount, and also the document which the creditor held in proof of the debt; and that it would be unjust and inexpedient, after the creditor had, on the faith of the cheque, granted the receipt, and given up the document proving the debt, to refuse him provisional sentence on the cheque.

1. BILL OF EXCHANGE—PROVISIONAL SENTENCE AGAINST
DRAWER ON PRODUCTION OF
NOTARIAL PROTEST.
2. ——— SUFFICIENTLY LIQUID, THOUGH
NOT ADDRESSED TO ANY PERSON
AS ACCEPTOR.

[VIDE BANK CHEQUES AND PROMISSORY NOTES.]

1. HOVIL & MATHEW v. POULTNEY.

[31st December, 1832.]

Proof of Presentment of a Bill of Exchange by the production of a Notarial Protest for Non-payment, in which Presentment is alleged, cannot in a Provisional Case be negatived by Parole Evidence.

Hovil &
Mathew
v.
Poultney.

In this case, which was an action against the defendant as drawer of a bill, due the 25th June, the plaintiff produced the bill and a notarial protest for non-payment against both acceptor and drawer, dated 27th June.

The defendant appeared, and denied that the notary had ever presented the bill to him, as stated in the protest; and further maintained that the delay of two days in presenting the bill was such a want of due negotiation as discharged the drawer from his liability.

The Court unanimously gave provisional sentence, leaving it to the defendant to establish his defence in the principal action.

2. HOLTMAN v. DORMEHL.

[31st August, 1837.]

The Liquidity of an Accepted Bill of Exchange is not affected by the fact that it was not addressed to any person.

Holtman
v.
Dormehl.

The Court granted provisional sentence on the following document :—

“ Cape Town, 15th May, 1835.

“ One year after this date, please pay this my order the sum of Rds. 340, value received, placing the same to account of

“ Your obedient servant,

“ H. W. MOLLER.

“ Accepted—S. F. DORMEHL.”

Notwithstanding that the Attorney-General objected that there was such an irregularity apparent on the face of the

bill, as to render it competent for him, under the provisional claim, to prove the real circumstances of the transaction, which he alleged were fraudulent, and sufficient to bar the plaintiff from any claim against the defendant in respect of this bill.

Holtman
v.
Dormehl.

The alleged irregularity consisted solely in the bill not being addressed to any person as acceptor.

The Court held that this circumstance was not sufficient to cause any doubt as to the liquidity of the document produced in support of the claim, and on this ground overruled the objection, without reference to the explanation given by the plaintiff's counsel as to the validity of the debt.

NOTE—*Postea* (23rd Nov., 1837), in the principal case the Court gave judgment for the defendant, with all the costs.

-
1. BOND, WITHOUT PRESCRIBED TERM OF PAYMENT.
 2. — NOTARIAL.
 3. — PAYABLE IN FUNGIBLES BY A FIXED DATE.
 4. — ERROR IN CESSION OF....
 5. — NOTICE CALLING IN....
 6. — PAYABLE ON TRANSFER OF LAND.
 7. — WHEN LIQUID, THOUGH REFERRING TO COLLATERAL DOCUMENT.
 8. — NOTICE TO PAY BY DEBTOR.
 9. — WHEN DUE, ON FAILURE OF PAYMENT OF INTEREST.
 10. — EFFECT OF GENERAL NOTICE TO CREDITORS BY EXECUTOR, ON TIME OF PAYMENT OF
 11. — CONSIDERATION IMPEACHED.
 12. — BY WIFE, NOT MARRIED IN COMMUNITY, AS SURETY OF HUSBAND.
-

1. BUSK v. CLOETE.

[14th March, 1828.]

Where, by a clause in a Bond with no prescribed term of payment, the contingency of its being called in before the expiration of a year is contemplated, payment is exigible within the year, although the Bond bears Interest at a certain rate per annum.

In this case provisional sentence was claimed within a year of its date, on a bond bearing interest at a certain rate *per annum*, and in which no term of payment was prescribed.

Busk
v.
Cloete.

Busk
v.
Cloete.

Cloete, for the defendant, objected, on the ground that by the decisions of the late Court in the cases of *Munnik v. Van der Riet*, in 1813, and others, and by the practice of this colony since, a rule had been established that bonds not bearing any express term of payment, but bearing interest at a certain rate *per annum*, cannot be called in till after one year from their date,—and quoted Dig. 50: 17, 34.

The Court held that, even if the above rule had been established in the law of the colony, a question which it was unnecessary to decide, this case was taken completely out of the operation of this rule, by reason that the bond in question contained the following clause:—It being understood that should the capital not be called in *previous to the expiration of a year*, or of any term of years, then," &c., &c.

And granted provisional sentence.

✓ 2. DENEYS v. STOFFLING.

[5th June, 1828.]

The "Gross" or Notarial Copy of a Notarial Bond is sufficient to support a claim for Provisional Sentence.

Deneys
v.
Stoffling.

The Court in this case granted provisional sentence on the production of the "gross" or notarial copy of the notarial bond in respect of which the sentence was claimed, and held that it was not necessary to produce the bond itself in the notary's protocol, except when the defendant denied that he had executed such bond (*vide Iles, qq., & Lawrence v. Martin, infra*, DOCUMENTS INSUFFICIENT—"BOND").

3. LETTERSTEDT v. WATNEY.

[17th December, 1833.]

Provisional Sentence given on a Bond for the amount therein acknowledged, although certain clauses of the Bond gave the Defendant the liberty of making payment in Fungibles by a certain date, and on his default entitled the Creditor to purchase such Fungibles at the Defendant's expense.

Letterstedt
v.
Watney.

In this case the plaintiff claimed provisional sentence on a bond, granted by the defendant to him, which contained the following clauses:—

amount in words
vs
extima 65126

1. "Appeared, &c., Mr. Peter Watney, who acknowledged himself to be truly and lawfully indebted to and in behalf of Mr. Jacob Letterstedt, in the sum of £100, arising from cash duly lent, renouncing, &c.

Letterstedt
v.
Watney.

2. "Which aforesaid sum of £100 the appearer promised and undertook to pay to the said Mr. Letterstedt, or his order, &c., in good and undamaged barley, at the rate of 4 Rds. (6 shillings) per muid, which barley the appearer promises and undertakes to deliver at, &c., between this day and the 15th March next, to the amount of 300 muids, and in failure whereof

3. "The appearer by these presents doth qualify the said Mr. Letterstedt to buy for his account and at his expense, at the public market, or somewhere else, such quantity of barley as will enable him to find the payment of the said capital advanced by him, the said creditor."

Menzies, J., and Kekewich, J., were of opinion that the second clause did not prescribe the *only* mode in which payment of the bond could be demanded by the creditor, but only barred the creditor from demanding payment of it before the 15th March in any other shape than in barley, and gave the debtor the privilege of paying it in barley *before the 15th March*, and that the debtor having failed to exercise the privilege within the said stipulated time, the privilege ceased, and the original absolute obligation to pay in money on demand, resulting from the term of the 1st clause, revived and became in force, as if the 2d clause had never been inserted in the bond, and that the 3d clause only gave the creditor a privilege of obtaining payment in a certain way if he preferred it, but did not bind him to have recourse to that mode unless he chose.

The Chief Justice held that the nature of the 2d and 3d clauses was such as to bar the plaintiff from obtaining provisional sentence on the bond for the sum now sued for.

Provisional sentence was given, as prayed (*vide infra*, Kidson v. Rafferty, Koemans v. Van der Watt, Borradailes v. Maynier, pp. 35—38).

4. RENS v. HAMMAN AND ANOTHER.

[10th December, 1834.]

Provisional Sentence on a Ceded Bond, notwithstanding that the Cession contained an Error in the Description of a Previous Cession.

In this case, the summons for provisional sentence set out, as the ground of debt, a bond passed and signed by the said Dirk Hamman in favour of Charles de Villiers, &c., &c.

Rens
v.
Hamman
and Another.

Rens
v.
Hamman
and Another.

(minutely describing the bond), "which bond was, on the 10th June, 1834, ceded and transferred to J. G. Mechau, or order, and by him, on the said 10th day of June, ceded and transferred to the plaintiff."

The bond produced agreed in every respect with the description in the summons, and the cession by Villiers to Mechau was indorsed on it, and dated 10th June, 1834.

The cession by Mechau to the plaintiff was by a notarial deed, dated 10th June, 1834; and by it Mechau ceded and transferred to the plaintiff "the notarial bond hereunto annexed, passed on the 13th May, 1834, before the Notary Blommestein and witnesses, by D. Hamman, in favour of C. J. de Villiers, for the sum of Rds. 1260, and by the said C. J. de Villiers ceded and transferred to the said J. G. Mechau on the 10th Jan., 1834."

Brand objected that this cession could not transfer the bond produced, which had been ceded on the 10th June, and not 10th January, and must be held to apply to some other bond.

The Court (the Chief Justice absent) overruled the objection, and gave provisional sentence.

5. NEDERLAND'S EXECUTORS v. GNADE.

[24th February, 1835.]

Notice to pay up a Bond proveable by Parole Evidence or Affidavit.

Nederland's
Executors
v.
Gnade.

Where provisional sentence was claimed on a bond stipulating three months' notice before payment could be demanded, the Court held that it was competent to prove that such notice had been given by parole evidence, and that the plaintiff was not precluded from doing so by having first attempted and failed to prove this by affidavit.

The Court also expressed an opinion that it was competent to prove such notice to have been given by affidavit.

[The latter is the general practice.]

6. VOUCHEE v. VAN ELLEWEE.

[7th November, 1837.]

A Bond in which the Obligor undertakes to pay the Purchase Money of Land on Transfer being given, is a sufficiently Liquid Document. The Summons should tender such Transfer forthwith.

Vouchee v.
Van Ellewee.

The plaintiff claimed provisional sentence on three private bonds, by which the defendant bound himself to pay the three

sums respectively mentioned in the bonds, being part of the price of a certain house and erf,—“*when the transfer thereof should be made to him.*” In the third bond, the words “*and not before,*” were added to the above quoted words. In his summons, the plaintiff offered forthwith to grant transfer of the property in question, and a copy of the proposed deed of transfer was served on the defendant along with the summons.

Vouchee
v.
Van Ellewee.

Cloete, for the defendant, maintained that these bonds were not such documents of debt as were sufficient to found a provisional claim.

But the Court held that they were, as in the event of the principal action being proceeded with, the plaintiff would, on putting them in evidence and tendering transfer, as he had done here, be entitled, without any further proof, to judgment, unless the defendant set up a special defence; and gave provisional sentence.

7. THOM v. THOM.

[21st Nov., 1837.]

A Collateral Document referred to in a Bond, as showing the Consideration thereof, need not be produced or founded on in claiming Provisional Sentence on the Bond.

The Attorney-General, for the plaintiff, claimed provisional sentence for £342 0s. 9d., against the defendant, on a bond described in the summons as having been passed by J. F. Beck, in his capacity of attorney, and duly authorised thereto by the defendant, on the 16th December, 1828, before the Registrar of Deeds, in Cape Town, in security of the said sum of £342 0s. 9d., then due by the defendant to Vos, as one of the guardians of the plaintiff, and which bond was ceded to the plaintiff on the 13th July, 1837.

Thom
v.
Thom.

The plaintiff put in the bond referred to in the summons, in which the said Beck, in his said capacity, declared, for the better security of a sum of £342 0s. 9d., due by his principal to Gabriel J. Vos, as one of the guardians of his minor son George W. Thom, “*as appears by a deed proving the share of inheritance, dated 25th July, 1817, and an extract resolution of the late Court of Justice, copy of which latter document is hereunto annexed,*” to bind specially,

Thom as a mortgage, certain three pieces of land, &c.; more-
 v. over, binding generally his constituent's person and all his
 Thom. property, &c.

Brand, for the defendant, objected that provisional sentence could not be given, unless the deed referred to had been founded on in the summons, a copy thereof served on defendant, and produced in evidence.

The Court overruled the objection, and gave provisional sentence, as prayed.

8. KRYNAAUW v. GILDENHUYSEN.

[20th February, 1840.]

Where the Debtor had given the Legal Notice that he would pay up his Bond to the Creditor, the Creditor, on default of such payment, is entitled to claim payment without giving notice calling in the Bond.

Krynauw
 v.
 Gildenhuisen.

The plaintiff claimed provisional sentence on a bond containing the following clause: "which payment the appearer shall be allowed and also obliged to make three months subsequent to legal notice having been given or received to that effect."

The plaintiff produced an affidavit by one E. Moore, that on the 17th October, 1839, by desire of the defendant, he gave the following notice in writing to C. J. Buissinne, then the attorney for the plaintiff:

"Madam,—I am directed by G. Gildenhuisen to give you notice that he will pay unto you, three months after date, the sum of £100, with the interest thereon, being the amount due by him on a bond.

(Signed) "E. MOORE.

"17th October, 1839.

"The Widow Krynauw."

To which the said Buissinne replied: "It is well."

The Chief Justice at first doubted whether the plaintiff was entitled to demand payment, unless she had given three months' notice to pay the debt; and that the defendant not having paid on the day on which he had given notice that he would pay, the notice given by him became of no effect.

But it was answered, and in this the Chief Justice concurred, that the effect of the clause of the bond was to

stipulate that the debt should become payable and exigible three months after notice being given by either of the parties that the loan originally made for an indefinite period should continue no longer. Krynaauw
v.
Gildenhuysen.

The Court unanimously gave provisional sentence, with costs.

9. FAURE v. WRIGHT.

[12th November, 1840.]

Where it is stipulated in a Mortgage Bond that unless the Interest be paid on the day on which it falls due, the Principal and Interest shall be considered as due without Notice, Provisional Sentence will, on non-payment of the Interest, be given for Capital and Interest, where there has been no Notice calling in the Bond, although it contain also the usual clause requiring such Notice.

In this case, the plaintiff claimed provisional sentence for the capital and interest due to him by the defendant, in virtue of a mortgage bond, passed by the defendant in favour of the plaintiff, which bond contained the usual clause: "which payment the appearer shall be allowed and also obliged to make three months subsequent to legal notice having been given and received to that effect;" and also the following clause: "and unless he the said appearer shall pay the annual interest on the above principal sum on the day it falls due, the principal and arrears of interest, &c., shall be considered as legally claimed and due without notice."

Faure
v.
Wright;

The bond was dated 6th November, 1839.

The interest was made payable at the rate "of 6 per cent. per annum, reckoned from this date inclusive;" consequently, the annual interest became due on the 6th November, 1840. On the 9th November, the summons was served, and immediately after the service the defendant tendered payment of the interest, which was refused.

The defendant maintained that as the plaintiff had not demanded payment of the interest on the 6th November, or previously to the service of the summons, that the mere fact of payment of the interest not having been made by the defendant on the 6th did not entitle the plaintiff, in virtue of the clause aforesaid to claim payment of the capital without three months' notice.

The Court unanimously held that the non-payment by defendant of the interest, although no demand had been made by the plaintiff, entitled the plaintiff to demand payment of the bond without any notice, and gave provisional sentence, as prayed.

10. SOUTHEY v. BORCHERDS, EXECUTOR OF DORMEHL.

[12th September, 1844].

Where Defendant, as Executor, had given Notice to Creditors to lodge Claims, in terms of the 30th section of Ordinance No. 104, the Plaintiff, who had lodged his Claim, was held entitled to claim Payment of his Bond without giving the usual legal Notice.

Southey
v.
Borchers,
Executor of
Dormehl.

In this case, the plaintiff claimed provisional sentence on a bond, granted by the deceased Dormehl, whose executor the defendant was, which contained a clause that it was to be payable after three months' notice to that effect should have been given by the creditor.

The defendant objected that no notice to pay had been given by the plaintiff.

The plaintiff replied that no such notice was necessary in this case, because the defendant had, in January last, published in the *Government Gazette*, in terms of § 30 of Ord. No. 104, a notice to the creditors of the deceased to lodge their claims, which the plaintiff had accordingly done with respect to this bond.

The Court, in respect of this reply, repelled the defendant's objection, and gave provisional sentence, with costs, and held that the decision in the case of *Smuts v. the Executor of Haupt*, 17th December, 1833 (*vide infra*, DOCUMENTS INSUFFICIENT—"BOND"), referred to by the defendant, which they considered to have been rightly decided, was not in conflict with the decision now given in this case.

11. CULLEN v. CULLEN.

[15th May, 1845.]

Affidavits held incompetent to prove a defence of want of Consideration of a Mortgage Bond.

Cullen
v.
Cullen.

In this case, the plaintiff claimed provisional sentence on a mortgage bond, executed by the defendant, in which he acknowledged himself to be indebted to the trustees of Gilmer and Martin in £470, "arising from the purchase of divers building materials, sold by Gilmer and Martin to Patrick Cullen (the plaintiff), and which have been used by him in and about the erection of a certain house and premises, erected on a part of the land hereunder mentioned, and which debt is taken over by him, the appearer (the defendant), renouncing therefore all benefit from the legal exception *non causa debiti*; binding for the security thereof specially as a mortgage, certain lot of ground, with the buildings thereon, situated," &c.

This bond had been assigned by the trustees of Gilmer and Martin to the plaintiff, for value received.

Ebden objected to provisional sentence being given, on the ground that the bond had been really granted by the defendant only as the surety of the plaintiff, and that the plaintiff having himself paid the amount to the trustees, could not, in respect thereof, by taking from them an assignment instead of a discharge, acquire any right of debt against the defendant, who had been surety, without any consideration given him by the plaintiff; that, therefore, in a question between the plaintiff and the defendant, this bond must be held to have been granted without consideration, and consequently to be one which gave no cause of action to the plaintiff against the defendant. In order to prove that there was no consideration given by the plaintiff to the defendant, he tendered the affidavits of the defendant, of the trustee who assigned the bond, and of the defendant's attorney.

Cullen
v.
Cullen.

The Chief Justice and Menzies, J., held that it was not competent to put in affidavits to prove the present or any other defence against a provisional claim.*

Musgrave, J., dissented from the proposition that in no case was it competent to prove by affidavits any circumstances in bar of a provisional claim, although he concurred that the affidavits tendered ought not to be received in the present case.

[Thereafter, by consent, provisional sentence was given, as prayed, the plaintiff consenting to submit all matters in dispute between him and the defendant to the arbitration of Clerke Burton, Esq., and that execution on the provisional sentence should be stayed until the arbitrator should have made his award, or until further order.—Costs in discretion of the arbitrator.]

12. NOURSE v. STEYN, WIFE OF GRIFFITHS.

[25th February, 1847.]

Provisional Sentence against a Woman married out of Community, who had bound herself as Surety and Co-principal Debtor for her Husband.

In this case, the summons claimed provisional sentence against the defendant, as married without community of property to Charles Griffiths, now an insolvent, and assisted as far as need be by her said husband, for the sum of £611 10s. 4d., being the balance due to the plaintiff on a mortgage bond for £700, dated 6th October, 1843, made and signed by J. A. Merrington, as the duly authorised agent of the said C. Griffiths, as principal debtor, and also by the said Merrington as

Nourse
v.
Steyn, Wife
of Griffiths.

* Affidavits, though not receivable as *proof* of a defence against a provisional claim on a liquid document, are received by the Court as presumptively authentic statements of facts on behalf of the defendant, the knowledge of which may cause the Court to require an answer from the plaintiff, or to order that the principal case be proceeded with.—[Ed.]

Nourse
v.
Steyn, Wife
of Griffiths.

the duly authorised agent of the defendant, as surety *in solidum* and joint principal debtor of the said sum of £700 in favour of the plaintiff, and which has become due and payable by reason of the insolvency of the said Charles Griffiths.

The summons was personally served on both the defendant and her husband.

No appearance was made for either. The bond executed by Merrington, binding the defendant *in solidum* as surety and joint principal debtor, under renunciation of the *Beneficia ordinis seu excussionis, Senatus-consulti Velleiani, et Authentice Si qua mulier*, was produced by plaintiff, as also a notarial power of attorney, executed first by Griffiths, and secondly by the defendant, in favour of Merrington, to execute the said mortgage bond with the renunciation of the above benefits.

Menzies, J., and Musgrave, J., doubted whether, as this was a bond by the wife *ex facie* for the benefit of her husband, provisional sentence ought to be given against her without proof that at the time of the execution thereof she was not under control and influence of her husband, and executed it freely and voluntarily, knowing the nature of the obligation she was contracting,—more especially seeing that as the bond was for the benefit of the husband he could not be allowed to act as his wife's *curator ad litem*, and *quoad hoc* that she had no *curator ad litem*.

Further consideration of the case was postponed to the 27th February; when Brand, for the plaintiff, quoted Van der Keessel, Th. 496; Van der Linden, note to Pothier on Oblig., vol. 1. c. 6, § 387; Lybrecht, Notar. Practyk, p. 75; Wassenaar, Notar. Pract., p. 7; Kos, Notar. Ambt, pp. 32—34; Tennant's Notary's Manual, p. 174; in respect of which authorities the Court held that the bond must be deemed valid without the necessity of any evidence to show that the wife was not unduly influenced by her husband, and gave provisional sentence.

1. CIVIL IMPRISONMENT.*

1. WOLFF v. DE VILLIERS.

[20th March, 1832.]

In an Application for Civil Imprisonment, the Defendant must be served with a copy of the Sentence, as well as a copy of the Writ, and the Sheriff's Return of "Nulla Bona."

Wolff v.
De Villiers.

In the above case, the Court unanimously held that to found an application for civil imprisonment it is necessary that the

* Although the decree of civil imprisonment on an unsatisfied judgment is not a provisional decree, it is included here, because being a summary proceeding it is disposed of by the Court at the same time with the provisional cases.—[Ed.]

defendant should be served not only with a copy of the writ and the sheriff's return of *nulla bona*, but also with a copy of the sentence,—and granted the defendant 14 days to see copy of sentence.

Wolff
v.
De Villiers.

1. CONDITIONS OF SALE BY AUCTION.

1. ORPHAN CHAMBER v. SERTYN AND OTHERS.

[1st December, 1831.]

Sureties signing Conditions of Sale provisionally liable.

Provisional sentence was given against sureties who had bound themselves only by signing the memorandum subjoined to the conditions of sale, by auction, in the usual form. The Chief Justice *dissentiente*.*

Orphan
Chamber
v.
Sertyn and
others.

1. GOOD-FOR—A SUFFICIENT DOCUMENT.

2. — NOT NECESSARILY PRESUMED TO HAVE BEEN PAID ON ACCOUNT OF ANTIQUITY.
3. — “EX FACIE” REFERRING TO OTHER MATTERS.
4. — SUFFICIENT WITHOUT “CAUSA DEBITI,” BUT PRESUMED AGAINST FROM ANTIQUITY AND OTHER CIRCUMSTANCES.

BRAND v. MULDER.

[13th October, 1829.]

Provisional Sentence on a “Good-for.”

The plaintiff claimed provisional sentence on a document signed by the defendant, of the following tenor:—

Brand
v.
Mulder.

“Cape Town, 19th February, 1829.

“Good-for Rds. 8116 5 sk. 4 st., with the interest thereon, from the 21st February next; say Rds. eight thousand one hundred and sixteen, five skillings and four stivers.

“M. J. MULDER.”

* On reference to the records of the late Orphan Chamber, the conditions of sale in this case, as far as regards sureties, were found to be the following:—

“3. The purchaser to produce two sureties, who must be owners of landed property, &c., who, together with the purchaser, are to bind themselves as sureties for the due payment of the purchase money, in manner hereinbefore mentioned, under the express renunciation of the law benefits, *ordinis divisionis et excussionis*, with the meaning and effect of which benefits they are to hold themselves perfectly acquainted.

“9. This property shall be taken possession of immediately, and shall remain

Brand
v.
Mulder.

The Attorney-General objected that this was not a document on which a provisional claim could be founded, because it neither expressed the *causa debiti* nor the creditor.

Cloete maintained that it was; and quoted several cases in which provisional sentence had been given by the late Court of Justice on documents of a similar nature, and the case of *Thwaits v. Murray*, 4th December, 1828, decided by the Supreme Court, in which provisional sentence was given on a similar document,—and referred to the old paper currency of the colony which was of a similar tenor. He quoted Voet 42: 1, 15, and the Proclamation of 22nd August, 1822.

Provisional sentence, as prayed.

2. WATERMEYER v. NEETHLING qq. DENYSSEN.

[13th July, 1831.]

Antiquity of a "Good-for," not necessarily a presumption of Payment.

Watermeyer
v.
Neethling qq.
Denysen.

In defence against this action, which was brought to recover from the defendant the amount of the following document,—

"Good for 300 Rds., on account of Mr. G. A. Watermeyer (the plaintiff). (Signed) "D. DENYSSEN.

"2nd May, 1811."

De Wet, for the defendant, maintained that to entitle the plaintiff to recover, the *causa debiti* should appear, and quoted Dutch Consult. vol. 1, c. 303, and Lybrecht's Red. Vertoog, vol. 2, cap. 33, § 3, p. 252.

The Court held that the document was of the nature of a promissory note, and that by the law of this colony a promissory note was valid, although it did not express, and that it was unnecessary for the plaintiff to prove, its *causa debiti* (*vide* Low v. Oberholzer, *infra* p. 43).

De Wet further maintained that by the lapse of time since the date of the document, a presumption of payment was established, which it was necessary for the plaintiff to rebut by evidence before he could obtain judgment, which he had not done; and quoted Dutch Consult. vol. 6, p. 327, and Dig. 22: 3, 26.

The Court held that the lapse of 20 years did not *per se* create a presumption of payment which it was necessary to rebut by evidence.

solely at the risk, loss, or profit of the purchaser, from the date of sale,—the purchaser and sureties binding their persons and property according to the law on that subject."

The memorandum signed by the purchaser and sureties, was as follows:—

"The said property having been put up, &c., &c., Nicolaas H. Sertyn and Frans Roos became the purchasers, for the sum of 13,000 guilders, or £325; and their sureties are Jacob Cantz and Hermanus Esterhuyse."—[Ed.]

The majority of the Court held that it was unnecessary to require the plaintiff (as proposed by Burton, J.,) to give his oath that the note had been given to the plaintiff for the consideration specified in the summons, and that no payment had been made on account of it to the plaintiff, nor any settlement taken place between him and the defendant; and gave judgment in favour of plaintiff, with interest from the date of the demand, with costs. (For the effect of antiquity coupled with other circumstances, *vide* Schiller *v.* Horak, next page.)

Watermeyer
v.
Neethling qq.
Denysen.

3. PRESTWICH *v.* ROBERTSON.

[20th November, 1838.]

Provisional Sentence on a "Good-for," although on the face of it was a reference to certain matters seeming to require explanation.

The following document, viz.:

"Good to W. Prestwich, for the sum of £314, being for money lent for self-use and the *Emperor Alexander*, at sundry times.

Prestwich
v.
Robertson.

"W. ROBERTSON.

"Cape Town, 30th December, 1835."

was held by the majority of the Court (the Chief Justice and Kekewich, J.,) to be a liquid document of debt, sufficient to warrant provisional sentence being given, although objected to as being a mere voucher intended to be used in a settlement of accounts between Prestwich and Robertson, who were joint owners of the ship *Emperor Alexander*, and that without extrinsic explanation as to the meaning of the words "*Emperor Alexander*," the document was as to that part unintelligible, and these words were to be considered as not inserted in it. Menzies, J., held the contrary.

The majority of the Court saw nothing in this document which could distinguish it from other Good-fors, on which provisional sentence has been constantly given (*e.g.*,—"Good-for £50 to A. B.; signed C. D.")

Menzies, J., held that the words "*Emperor Alexander*" rendered it impossible, *ex facie* of the document, to ascertain the true object and intent for and with which it had been granted by the defendant,—that the plaintiff was bound to give some explanation of the document before he could claim judgment on it, and *therefore* it was not a liquid acknowledgment of debt, on which provisional sentence could be claimed.

Provisional sentence, as prayed. Execution to be stayed until after the 27th instant.

2. SCHILLER, EXECUTOR OF CLOETE, v. HORAK.

[1st November, 1839.]

Antiquity coupled with other circumstances a Defence against a Provisional Claim on a "Good-for."

Schiller,
Executor
of Cloete,
v.
Horak.

In this case, provisional sentence was claimed on four Good-fors,—

For £97 10.....16th February, 1823.
52 10.....10th April, 1823.
11 5.....1st September, 1825.
4 19.....23rd January, 1826.

Musgrave, for the defendant, objected, 1st, that no such document could, in law, be sustained as the ground of a provisional sentence;—2nd, that on account of the antiquity of these documents and of no claim having been made by the deceased creditor in his life time, although the debtor's immoveable property had been sold expressly for payment of his debts, which had been called in by advertisement in the *Gazette*, they could not be considered as proving a liquid claim.

The Court, in respect of the decisions in the cases of *Brand v. Mulder* and *Watermeyer v. Denyssen*, repelled the first objection, but sustained the second, and refused provisional sentence.

1. JUDGMENT OF INFERIOR COURT—SUFFICIENT.*

2. ——— SUFFICIENT WITHOUT
RETURN OF "NULLA BONA."

3. ——— DEFENCE BELOW.

1. DE VILLIERS v. CRUYWAGEN.

[13th March, 1832.]

Provisional Sentence may be claimed in the Supreme Court on a Judgment obtained in an Inferior Court.—The Record or an Office Copy of the Sentence must be produced.

De Villiers
v.
Cruywagen.

In this case, a provisional claim was made for the amount of two sentences given by the Resident Magistrate of Cape Town, and the defendant was called on to confess or deny these sentences, and the validity of the debt.

The Attorney-General objected that the plaintiff having

* The judgment of a Court is *prima facie* the clearest possible proof of a debt due by the party condemned in such judgment. To such a judgment, its liquidity being indisputable, the defendant's signature is assumed, and provisional sentence given on it. The reason why provisional sentence is sought on a judgment of an inferior Court is because civil imprisonment may be prayed only on unsatisfied judgments of Superior Courts.—[Ed.]

sued in and obtained sentence of the inferior Court, and having attempted to put the same in execution, was barred from now suing in the Supreme Court for the same debt.

De Villiers
v.
Cruywagen.

This objection was overruled, the Court holding that an action may be brought in this Court on a judgment obtained in an inferior Court.

2nd. He objected that the sentences of the Resident Magistrates, even if they could be sued on at all, were not sufficient to found a provisional claim.—This objection was also overruled.

3rd. He objected that there was not sufficient evidence of the sentence to warrant a provisional sentence for the amount thereof, in respect that neither the record nor an office copy was produced, but only the warrant of execution, signed by the Magistrate. (Voet 22: 4, 7.)

The Court sustained this objection, on the ground that, although the warrant might be evidence that a sentence had been given, and of the amount, still it was not sufficient evidence of the sentence upon which the defendant could be called in a provisional claim, to confess or deny the validity of the sentence as, if the record or an office copy of the sentence were produced, it might appear, *ex facie* of it, that it was null or informal; and therefore, on this ground alone, refused the provisional claim, with costs.

2. TREDGOLD v. LEEUWNER.

[23rd December, 1834.]

Provisional Sentence given on a Judgment of an Inferior Court, without allegation or proof of a return of "Nulla Bona."

In this case, the Court decided, that in an action to obtain provisional sentence in respect of a sentence of a Resident Magistrate's Court, it is not necessary for the plaintiff to allege or prove that a warrant in execution thereof had been issued, and a return of *nulla bona* made thereon.

Tredgold
v.
Leeuwner.

3. GREIG v. DE LIMA.

[19th November, 1840.]

Provisional Sentence on a Judgment of an Inferior Court, where the Defendant pleaded that his defence had been improperly overruled below.

Provisional sentence was claimed in virtue of a sentence of the Resident Magistrate of Cape Town, condemning the defendant in payment of the amount of a promissory note made by one Theron, and endorsed by the defendant.

Greig
v.
De Lima.

Greig
v.
De Lima.

The plaintiff in the Magistrate's Court merely stated that the note had been made by Theron and endorsed by the defendant, without stating that the maker had failed to pay the same on demand.

Musgrave, for the defendant, produced an affidavit, setting forth that in the Court of the Resident Magistrate the defendant had pleaded, as a defence, want of due negotiation, no notice having been given him by the holder of the non-payment by the maker of the note when due, which he considered was a sufficient defence, and ought to have been sustained by the Resident Magistrate; and contended that when a claim was made in this Court in virtue of the sentence of an inferior Court, that sentence, although final in the inferior Court, afforded only *prima facie* evidence of the debt when the judgment of this Court was sought,—which, although sufficient to warrant provisional sentence when no objection was made, might, like any other apparently liquid ground for a provisional sentence, be rebutted by a defence, which, like the present one, was or could be instantly instructed.

The Court would have refused the provisional sentence, if the facts had been as stated by the defendant.

Sed postea (30th November, 1840,) the plaintiff produced the record of the proceedings in the Resident Magistrate's Court, showing that evidence had been given to the Resident Magistrate that due notice of the non-payment had been given to the defendant,—and besides, that subsequently the defendant had repeatedly acknowledged his liability, and promised payment.

The Court gave provisional sentence, as prayed.

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1. LEASE.—NOTARIAL.
 2. — UNDERHAND.
 3. — ALLEGATION OF UNLIQUIDATED DAMAGES NO
DEFENCE AGAINST PROVISIONAL CLAIM FOR
RENT ON
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1. NEETHLING v. TAYLOR.

[23rd December, 1834.]

Production of Lease sufficient to entitle the Lessor to claim Provisional Sentence for Rent.—Procurator "in rem suam" entitled to suc.

Neethling
v.
Taylor.

The plaintiff claimed provisional sentence in the following summons:—

"Command A. Taylor, &c., that, &c., he render to J. H. Neethling, &c., acting in his capacity of testamentary executor

of the late A. Munnik and his predeceased wife, and administrator of their minor heirs, and on an authorization of J. G. Munnik, the proprietor of a certain water mill, tenanted by the said A. Taylor,—first, the sum of Rds. 207, which he owes to the said J. H. Neethling upon and by virtue of a certain promissory note, passed by the said A. Taylor in favour of the said J. H. Neethling, bearing date, &c. 2nd,—The sum of Rds. 110, &c., which he owes to the said J. H. Neethling upon and by virtue of the said promissory note, &c., and upon and by virtue of a certain notarial contract passed, &c.—the said sum of Rds. 110, being the rent of the said mill, for the month of November, 1834, which became due on the 1st December, 1834, and payable to the plaintiff, by virtue of an authorization of the said J. G. Munnik,” &c.

Neethling
v.
Taylor.

The defendant did not appear.

The plaintiff produced, 1st, a notarial contract for the lease of the mill, mentioned in the summons, dated 9th July, 1833, executed by J. G. Munnik and the defendant, whereby the former let to the latter the mill, and in which it was stipulated that “this lease is to be for five successive years, commencing with the 1st July, 1833, and expiring on the 30th June, 1838, &c. The tenant shall pay unto the landlord a rent of Rds. 110 per month, payable monthly.”

2nd, the following document:—

“I, J. G. Munnik, hereby authorize J. H. Neethling, irrevocably and as *in rem suam*, in his capacity as testamentary executor of the late A. Munnik and predeceased wife, to receive and recover from Mr. A. Taylor, the tenant of my mill, all rents due for the said mill, at Rds. 110, since the month of September due thereon, and that will hereafter become due.

“Witness my hand,

“J. G. MUNNIK.

“Rondebosch, 16th September, 1834.”

And 3rd, the following promissory note:—

“Rondebosch, November 20, 1834.

“Fourteen days after date, I promise to pay to J. H. Neethling, Esq., Rds. 207, for rent due to Mr. J. G. Munnik, for part of the month of September and for the month of October,—and I hereby further engage to pay to the said J. H. Neethling, Esq., the rent of mill, &c., as it becomes due, until properly authorized to the contrary by Mr. Munnik.

“A. TAYLOR.”

The Court were of opinion that the plaintiff was, in respect of the promissory note, entitled to provisional sentence for the Rds. 207, and that the deed of authorization in favour of plaintiff, even without, but *à fortiori* with, the undertaking at

Neethling
v.
Taylor.

the end of the promissory note, had the effect of placing the plaintiff in the same situation and vesting him with the same title to sue for the rent that Munnik himself would have had.

But the Chief Justice held that the contract of lease was not sufficient to have entitled the landlord to provisional sentence for rents alleged by him to be due; and that the contract, even in conjunction with the note and undertaking at the end of it, was not evidence sufficient to entitle the plaintiff to provisional sentence for the rent claimed for the month of November.

Menzies, J., and Kekewich, J., were of opinion that the production of a contract of lease, signed by a defendant, by which he stipulates to pay rent to the plaintiff, is of itself sufficient to entitle the plaintiff to provisional sentence for any rent alleged by him to be due for any part of the period of the term during which, by the contract, the lease is to subsist; and therefore that, independently of the note signed by the defendant in favour of the plaintiff, the latter, in virtue of the contract of lease and the authorization of the landlord, would have been entitled to provisional sentence for both the sums claimed in the summons; and therefore gave provisional sentence, as prayed.

2. TRUTER v. EVEREST.

[17th February, 1842.]

Provisional Sentence on an Underhand Contract of Lease.

Truter
v.
Everest.

In this case, the plaintiff claimed provisional sentence for £60, for four months' rent of a certain house, &c., from 1st October, 1841 to 31st January, 1842, by virtue of an underhand contract or agreement, dated 12th August, 1840, containing the following stipulation:—"Mr. E. (the defendant) takes and hires of Mr. Truter (the plaintiff) his house, &c., on a lease for five years, to be reckoned and computed from the 12th August instant. The conditions of the lease are as follows: Mr. Everest engages to pay, by way of hire or rent for said house, the sum of £15 per month," &c.

Cloete, for the plaintiff, put in this contract, and claimed provisional sentence, maintaining that it was not necessary for him to prove that the defendant had had possession of the premises, and that the rent for the past period must, in law, be presumed to be due, in the same way that interest for a past period is presumed to be due, unless the defendant shall prove it to have been paid, or show cause why he shall not be liable for such rent.

The Court granted provisional sentence, as prayed.

3. VOWE *v.* PEDDER.

[9th Feb., 1843.]

The Allegation of Unliquidated Damages for want of Repairs is no defence to a Provisional Claim for Rent on a Lease.

This was a claim for provisional sentence for £15, on a quarter's rent, from 1st October to 31st December, 1842, on certain premises (a house and two small farms) let by the plaintiff to the defendant, and possessed by the defendant.

Vowe
v.
Pedder.

The plaintiff put in the contract of lease, by which it was stipulated that the rent should be paid quarterly.

Musgrave, for the defendant, referred to a clause in the contract, by which it was stipulated, "That all necessary repairs the said premises may require shall be borne and sustained by the lessor (the plaintiff)," and averred that the plaintiff had failed to make certain necessary repairs, although she had been required by the defendant, and had promised to have them made,—and put in, 1st, an affidavit to that effect by the defendant;

2ndly, a letter (admitted by the plaintiff) by plaintiff's husband, dated 22nd August, 1842, to the defendant, agreeing to make certain repairs, to the extent of £15, according to a specification sent to the plaintiff by the defendant;

3rdly, an affidavit by A. B., a mason, who swore that about six months ago he had been employed by the plaintiff to execute certain repairs, but that after he had begun and made repairs on the house to the amount of £2, he had then been obliged to desist by the plaintiff's failure to supply him with lime,—although she had repeatedly been called on to do so.

He maintained on these grounds that provisional sentence ought not to be granted, as this defence, if proved in the principal case, would entitle the defendant to judgment or absolute from the instance.

The Attorney-General, *contra*, maintained that the clause about repairs in the contract of lease was not a condition of the lease, and that no allegation of the lessor having failed to make the repairs which in the lease, it was stipulated should be made by her,—however clearly established by evidence it might be,—could be pleaded to any extent as a defence against a claim for rent for a period during which the lessee had been in possession, even in the principal case,—and *a fortiori* could not be pleaded as a bar to provisional sentence.

The Court gave provisional sentence, as prayed.

The grounds on which their opinion was founded were :

That the defendant in an action for rent is entitled to plead as a defence, *pro tanto*, that he has sustained damages to a certain amount by the failure of the plaintiff to make repairs which he was bound to make by the lease, and which he had

Vowe
v.
Pedder.

been duly required to make ; and, therefore, that the fact of the lessee having suffered damage in this way might relevantly be pleaded as a bar to provisional sentence, *provided the defendant could make out a "primâ facie" case*, to the satisfaction of the Court, that in the principal case he would be able to prove that he had sustained such damage to a certain amount.

That although the defendant had made out a *primâ facie* case that the premises possessed by him had required necessary repairs to the amount of £15, and that the plaintiff, although duly requested, had failed to make them,—yet that the amount of expense required to make the repairs was no criterion of the amount of damage sustained by the plaintiff's failure to make the repairs, and that the defendant had produced no evidence of any kind to show the amount of the damage he had sustained, much less to show that it amounted to £15. For aught that appeared, the damage might be only nominal or trifling. The defendant, during the period for which rent was claimed, had not only continued to possess the house in which the repairs were requisite, but had enjoyed the benefit resulting from the possession of the farm.

That the defendant had, therefore, failed to make out a *primâ facie* case, to satisfy the Court that in the principal action he would succeed in proving that he had sustained damage to any extent which would, in law, have the effect of discharging him from the liability for the whole or any part of the rent claimed ; and consequently he could not oppose provisional sentence being granted.

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1. LIQUID ACKNOWLEDGMENT OF THE RECEIPT OF THE PURCHASE PRICE OF GOODS "TO BE DELIVERED."
 2. ———— ENGAGING TO PASS A BOND.
 3. ———— OF DEBT PAYABLE IN FUNGIBLES.
 4. ———— OF DEBT PAYABLE IN FUNGIBLES, BUT ON FAILURE, IN CASH
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1. DREYER v. ROOS.

[29th February, 1828.]

An Acknowledgment of the Receipt of the Purchase Price of Goods "to be delivered" is sufficient to claim Provisional Sentence for the Repayment of such Price,—the "onus probandi" the delivery being on the Defendant.

Dreyer
v.
Ross.

The plaintiff put in a written acknowledgment by the defendant, acknowledging that he had received from the plaintiff

Rds. 260, as the purchase price of two leaguers of brandy, to be by him (the defendant) delivered to the plaintiff; and claimed provisional sentence either for repayment of the said sum or delivery of the brandy.

Dreyer
v.
Ross.

The defendant alleged, but did not tender relevant evidence to prove, delivery.

The Court held that the *onus probandi* the delivery of the brandy, or of a good reason for the non-delivery of it, lay on the defendant, and gave provisional sentence for Rds. 260, and costs.

2. BORRADAILES & CO., qq. LORD CHARLES SOMERSET,
v. MAYNIER.

[1st December, 1829.]

Provisional Sentence on an Obligation "ad factum præstandum."

Provisional sentence was in this case sought on a claim that the defendant should be decreed to pass a mortgage bond in terms of a written obligation, produced by the plaintiff, dated 28th September, 1829, signed by the defendant, in which he "engaged" on Friday, the 2d October next, to appear before the Registrar of Deeds, to pass a bond for Rds. 5000 in favour of the plaintiff, specially mortgaging certain landed property.

Borradailes qq.
v.
Maynier.

Cloete, for the defendant, maintained, *inter alia*, that it was not competent to claim provisional sentence on an obligation *ad factum præstandum*, which this was.

The Chief Justice held that provisional sentence should be refused, not in respect of the abstract legal principle that an obligation *ad factum præstandum* could in no case be the ground of a provisional sentence, but because he thought the nature of this particular obligation was not such as to entitle it to a provisional sentence.

The other two Judges held that, by the law of Holland, provisional sentence might competently be granted in respect of obligations *ad factum præstandum*, as well as of obligations *ad solvendum*, where, as in this case, the obligation was liquid, absolute, and unconditional, and of such a nature that in the event of the defendant succeeding in the principal case he could be replaced in the situation in which he would have been, if he had not been obliged to perform the obligation; and granted provisional sentence, with costs.* (*See vide Merula*, b. 4, s. 37, c. 2, note 5 b.)

* This is the only case in the Supreme Court, since its establishment, in which provisional sentence has been granted "*simpliciter*" *ad factum præstandum*.—[Ed.]

See Christie vs Kinnear 2 Scarle 272

3. KOEMANS *v.* VAN DER WATT.

[7th August, 1838.]

Provisional Sentence claimed on a Document acknowledging Money to be due, but payable in instalments of Wood.

Koemans
v.
Van der Watt. Provisional sentence was claimed on the following document:—

"I, the undersigned, do hereby acknowledge to be indebted to Mr. N. Koemans, or order, a sum of Rds. 800, for value received, of which I, the undersigned, promise to pay monthly Rds. 100 in good and useful wagon-wood and stinkwood, at the bay price, to be delivered at the Knysna, to his agent there.

(Signed) "S. S. VAN DER WATT.

"30th November, 1829."

Cloete, for the defendant, quoted Merula, Manier van Procedeeren, book 4, t. 37, c. 2, note 5 *b.*; the Ordinance of 1st April, 1580, § 3—introducing *Provision of Namptissement*; *Zurk, Codex Batavus, voce "Provisie;"* and the case of Van Oudtshoorn *v.* Cromhoud, 11th March, 1819, in which the late Court of Justice refused provisional sentence on a document to the following effect:—

"I, J. F. Dreyer, acknowledge to have sold to Van Oudtshoorn 100 muids oats, at Rds. 4 per muid, which I promise and engage to deliver to him at his house, free of expense, in January, 1819, acknowledging to have received Rds. 120 from Mr. Van Oudtshoorn, in part payment of the price.

(Signed) "J. F. DREYER."

"I, the undersigned, bind myself for the said Dreyer, for the performance of his above engagement to deliver 100 muids of oats, for the price above mentioned, renouncing all benefits to which sureties are entitled;—and especially, in case said Dreyer shall fail to deliver said oats in January, 1819, Mr. Van Oudtshoorn shall be at liberty to purchase in the town market, for account of said Dreyer, and for that of his surety, at the price at that time,—the above engagement notwithstanding remaining in full force.

(Signed) "J. M. CROMHOUD."

The Attorney-General, *contra*, quoted Van der Linden's Judicial Practice, Vol. I. b. 2: c. 6, § 13.

The Court held that, *ex figura verborum*, the obligation in question was an acknowledgment of a money debt, which existed and was due previously to the granting of the acknowledgment, coupled with a promise to discharge said debt within a certain time, by periodical instalments, to be paid by deliveries of wood, to the value of Rds. 100 each instalment.

In this view of the case it seemed to be the opinion of the Court that, by the defendant's failure to perform the condition, in respect of which he had been allowed time to pay the debt by monthly instalments in wood, the debt became purified of the condition as to the time and manner of payment, and that the plaintiff was now entitled to demand payment of it instantly, and in money (*vide* Letterstedt *v.* Watney, p. 16; and Kidson *v.* Rafferty, next case). Kosmans
v.
Van der Watt.

But if this document is to be considered as the evidence of a contract, by which the plaintiff had bought, and the defendant, in consideration of a price then paid to him, sold and engaged to deliver to the plaintiff a certain quantity of wood, the Court held that the authority quoted from Merula, and the decision in Van Oudtshoorn *v.* Cromhoud, rendered it at least very doubtful whether the Court could, under any circumstances, grant provisional sentence on such an obligation,—or even on one in which the defendant, acknowledging to be indebted to the plaintiff in a money debt previously existing, bound himself, *absolutely* and without any condition as to time, to discharge the debt, by delivery of any *species* or fungible other than money; that before deciding these points it would be necessary to reconsider well the decision of the Court in Borradailes, qq., *v.* Maynier (*supra* p. 35), where provisional sentence was given *ad factum præstandum*; also Cloete *v.* Watney,* (22d March, 1831,) and others.

[No decision was given on the above points, provision having been refused on other grounds. *Vide infra*, "DEFENCE."]

4. KIDSON *v.* RAFFERTY.

[14th August, 1838.]

Provisional Sentence for the Liquidated Value of Fungibles "to be delivered."

The defendant did not appear, but the Court, after having their attention called to the document, and after deliberate consideration, granted provisional sentence for £48 7s. 6d., on the following document:—

Kidson
v.
Rafferty.

"Graham's Town, 9th July, 1836.

"I acknowledge to be indebted to Mr. Kidson forty-three half-aums of wine of next year's vintage, which I engage to

* In Cloete *v.* Watney, the plaintiff prayed provisional sentence for the delivery of 300 muids of wheat, in pursuance of a written contract, or the sum of £195, money paid by the plaintiff to and on behalf of the defendant, as the purchase price of the said wheat, in pursuance of the contract. Provisional sentence was given for £195, with interest.

Kidson
v.
Rafferty.

deliver in Graham's Town in April, May, and June, 1837, one-third of the quantity in each month. On the failure of delivering it in the said period, then the amount shall be paid in cash, at the rate of Rds. 15 per half-aum.—For value received.
"J. RAFFERTY."

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|-----|------------------|--|
| 1. | PROMISSORY NOTE— | DELAY IN DEMANDING PAYMENT OF |
| 2. | — | BY EXECUTOR OF ESTATE, SUBSEQUENTLY SURRENDERED. |
| 3. | — | LIQUID, NOTWITHSTANDING ALLEGATION OF USURY. |
| 4. | — | WITH PENAL STIPULATION. |
| 5. | — | LIQUID, NOTWITHSTANDING ALLEGATION OF USURY. |
| 6. | — | PROOF OF DISPUTED SIGNATURE. |
| 7. | — | ALLEGED ERROR IN DATE. |
| 8. | — | WITHOUT "CAUSA DEBITI." |
| 9. | — | PENALTY ON "MALA FIDE" DENIAL OF SIGNATURE. |
| 10. | — | WHEN UNAFFECTED BY COLLATERAL DOCUMENT. |
| 11. | — | BY INSOLVENT, AFTER SEQUESTRATION. |
| 12. | — | CONSIDERATION OF |
| 13. | — | DITTO |
| 14. | — | PAYMENT TO PAYEE. |
| 15. | — | DITTO. |
| 16. | — | WHERE SIGNATURE HAD BEEN PREVIOUSLY DENIED. |
| 17. | -- | PATENT ERROR. |
| 18. | — | PROOF "INSTANTER" OF SIGNATURE. |
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1. REITZ v. KOCK.

[1st April, 1828.]

Provisional Sentence on a Promissory Note, payment of which was demanded four years after it was due.

Reitz
v.
Kock.

Provisional sentence was granted on a promissory note, made by defendant, dated 3d April, 1824, and indorsed to plaintiff, notwithstanding it was objected that, from the time which had elapsed before any demand was made on it by

plaintiff, it must be presumed to have been indorsed after it was due; and that even although indorsed before due, yet that the plaintiff's long silence barred him from now demanding payment, because a timeous presentation might have prevented some damage to defendant (what that damage was the defendant's counsel did not explain). (*Vide Watermeyer v. Denyssen*, p. 26.)

Reitz
v.
Kock.

2. ROSS AND OTHERS v. MUNTINGH.

[5th February, 1833.]

Provisional Sentence on a Promissory Note against an Executor, the maker, although the Estate was subsequently surrendered as Insolvent.

This was a claim for provisional sentence by the plaintiffs, as indorsees of the following note:—

Ross and
others
v.
Muntingh.

“Cape of Good Hope, 9th November, 1832.

“Two months after date, I promise to pay to Mr. J. M. F. Albertus, or order, the sum of £267 18s. 9½d., being the balance of account between the late Mr. J. V. Hussey and Messrs. D. & B. Phillips, date 23d June, 1832.

(Signed) “H. G. MUNTINGH,
“Executor to the Estate of the
late J. V. Hussey.”

The executor had published the usual notice to creditors; and after the three months had expired, he paid some creditors in full, and granted the note in question.

Thereafter, a claim was made against Hussey's estate, which, having been referred to arbitration, was sustained by the arbitrators to an extent which the defendant alleged made the estate insolvent, and he accordingly surrendered the estate as insolvent.

De Wet maintained that, in consequence of the surrender, the defendant was no longer liable for the amount of the note, for which he was sued.

The Attorney-General maintained the contrary, and quoted the Proclamation of the 15th October, 1813.

The Court gave provisional sentence, as prayed.

This judgment was founded altogether on the liquid nature of the document, and the absolute undertaking to pay, and the Court did not decide any of the questions of law maintained as to the liability of executors, or the mode in which they can be relieved from their responsibility.

3. RENS *v.* HORAK.

[28th February, 1833.]

Provisional Sentence where the Consideration of the Note was alleged to be Usurious.

Rens
v.
Horak.

Defendant, in defence against the provisional claim which plaintiff in this action made, in virtue of a promissory note passed by her in favour of her son, and by him indorsed to plaintiff, alleged that this note had been given to plaintiff by her and her son for a usurious debt, and offered to instruct this defence by a witness.

The Court refused to allow the witness to be examined, or to stay the provision in respect of the allegation.

Menzies, J., and Kekewich, J., concurred in this judgment, solely because they thought that the facts offered to be proved by defendant were not sufficient clearly to establish the usury, and not on the ground that a defence of usury, offered to be instructed instantly and clearly by parole evidence, ought not to be admitted to proof in bar of a provisional claim (*vide* Freshfield *v.* Harries, and Kennel *v.* Harries, *infra*, "DEFENCE," and Muller *v.* Redelinghuys, p. 41).

4. STEYTLER *v.* SMUTS.

[2d December, 1833.]

Provisional Sentence on a Promissory Note containing a penal stipulation, for the amount of the Note, though not of the Penalty.

Steytler
v.
Smuts.

This was a claim for provisional sentence for £44, and 5 per cent. commission, in virtue of a promissory note for the former sum, with a stipulation that if not paid within ten days after it was due, the defendant should pay 5 per cent. commission besides, for collecting the said amount, with the interest thereon.

The Court held that the stipulation for the commission was a lawful one, but that the 5 per cent. being a penalty, the plaintiff was only entitled to claim in respect of it *ad id quod interest*, and as the amount *quanti interest* was not ascertained by the promissory note, the claim for it was not a liquid claim, and consequently could not be recovered by provisional sentence.

They, therefore, gave provisional sentence for the principal, interest and costs, and refused provisional sentence for any part of the commission, leaving it to the plaintiff, if he could show that by the non-payment of the note in due time, he had sustained any damage, or been put to any expense, which was not covered by the costs now awarded to him, to claim the sum in the principal case. (*Vide Voet* 45: 1, § 11, 12, 13.)

Steytler
v.
Smuts

5. MULLER v. REDELINGHUYS AND VAN REENEN.

[18th February, 1834.]

Provisional Sentence against the Maker and Indorser in blank of a Promissory Note, notwithstanding Proof tendered on their part that the Holder had become possessed of the Note for a Usurious Consideration.

The plaintiff claimed provisional sentence in respect of the following note:—

Muller
v.
Redelinghuys
and
Van Reenen.

“Cape Town, 11th November, 1833.

“Three months after date, I, the undersigned, undertake to pay to Mr. S. van Reenen, or order, the sum of Rds. 1500, for value received (Signed) “P. J. REDELINGHUYS.

(Indorsed) “S. VAN REENEN.”

The Attorney-General and Brand, in defence, stated that this note had been made and indorsed by the defendants respectively for the accommodation of, and had been left in possession of, the defendant Redelinghuys, who had placed it in the leaves of a book, which he had on loan from one Hesselmeyer Van Hellings, and which book, by mistake, he returned with the note in it to H. Van Hellings. Van Hellings having thus got possession of the note, fraudulently, and for his own benefit, discounted it with Muller, the plaintiff (but without informing Muller how he had obtained it), under deduction of the legal interest and of Rds. 100 over and above the legal interest.

In respect of these allegations, they maintained, 1st: That Muller had committed usury, and, therefore, was not entitled to recover against the defendants. 2dly: That even if he were entitled to recover, it could only be for the amount which he had actually paid for the note;—and they offered to prove these allegations by parole evidence.

The Court refused to allow these allegations to be proved by parole evidence in defence against the provisional claim; and gave provisional sentence, with costs. (*Vide Freshfield v. Harries, Kennel v. Harries, infra*, “DEFENCE;” and Rens v. Horak, p. 40.)

6. DIETERMAN v. CURLEWIS.

[30th June, 1834.]

*Signature, when denied, may be proved "instantly."*Dieterman
v.
Curlewia.

Cloete, for defendant, denied the handwriting of the note to be the defendant's.

The Attorney-General offered to prove it *instantly*.

Cloete admitted his right to do so. Voet 42: 1, 7.

Plaintiff called

James Mortimer Maynard.—I have seen defendant frequently write his name. The note, dated 16th May, 1833, I believe to be in the handwriting of the defendant, and the signature to be his. I believe the same as to the note dated 20th June.

Plaintiff closed his case.

Defendant made no defence.

Provisional sentence, as prayed (*vide* Still v. De Wet, DOCUMENTS INSUFFICIENT—"PROMISSORY NOTES").

7. WATERS & HERRON v. ROUBAIX.

[26th August, 1834.]

*Provisional Sentence against the Maker of a Promissory Note, who alleged an error in the date of the Note.*Waters &
Herron
v.
Roubaix.

This was a claim for provisional sentence, made by the payees, on the following promissory note:—

"No. 1066.

"Due 29th July, 1834.

"Cape Town, 29th March, 1834.

"Four months after date, I promise to pay to the order of MESSRS. Waters & Herron the sum of Rds. 860 4 sk., for value received in goods.

(Signed)

"P. S. A. DE ROUBAIX."

De Wet, for defendant, maintained that his client had signed the note without observing that it was made payable on the 29th July, instead of being made payable on the 29th August, as had been agreed upon between him and the plaintiffs, and in support of this defence produced an account of goods furnished to him by plaintiffs, to the amount of Rds. 860 4 sk., the last item of which was dated April 17, and at the foot of which was written

"Settled by bill, due 29th August, 1834.

"Pro Waters & Herron,

(Signed)

"E. HERRON."

And maintained that he had had no other transaction except this, to which his promissory note could relate, and that from the date of the last item in the account being 17th April, and the date at which the bill by which it was acknowledged to have been settled was stated to be 29th August, it was clear that the note ought to have been dated 29th April instead of 29th March, and therefore that he was not liable, and could not be sued, for the amount of the note before the 29th August.

Waters &
Herron
v.
Roubair.

But the Court held that it was not clearly proved by the documents themselves that the note and the account related to the same transaction, or if any mistake had been made, in which of the two the mistake had been made; and that the plaintiff was, therefore, entitled to provisional sentence.

Provisional sentence, as prayed, with costs.

8. LOW v. OBERHOLZER.

[11th August, 1835.]

Provisional Sentence on a Promissory Note not expressing any "causa debiti."

In this case, provisional sentence was claimed by the plaintiff, the indorsee of the following note, which was admitted to have been made and signed by the defendant:—

Low
v.
Oberholzer.

"Two years after date, I, the undersigned, accept to pay to J. C. Eksteen, J's. son, or order, Rds. 650, with interest; for the security of which I bind my person and property, according to law.

(Signed) "C. J. OBERHOLZER.

"Graaff-Reinet, 4th May, 1833."

Stoll, for the defendant, maintained that no provisional sentence could be given on this note, because it did not express any *causa debiti*, and quoted the cases of *Freshfield v. Harries*; and *Kennel v. Harries*; and the authorities therein quoted—*infra*, "DEFENCE"—(*sed vide Watermeyer v. Denyssen*, p. 26); but he neither alleged that the plaintiff was not an onerous and *bonâ fide* indorsee, nor made any statement of the circumstances under which the note had been granted; he did not even allege that the note had been granted without value.

The Court held that the defence set up in this case was not a sufficient ground for refusing provisional sentence; and gave provisional sentence, as prayed, accordingly.

9. DENEYS v. DANIEL.

[10th February, 1835.]

*Penalty on "malâ fide" denial of Signature.*Deneys
v.
Daniel.

On the 3d February, 1835, the defendant had denied his signature to the note on which provisional sentence was claimed,—and his council was instructed to deny that he could write; and the plaintiff was allowed a day to prove the signature.

This day the plaintiff proposed to call, as a witness, a person who had seen the defendant affix his signature; whereupon the defendant's counsel stated that he admitted the signature.

Cloete, for the plaintiff, moved that in respect of the defendant's groundless and false denial of his signature, the Court should award against the defendant something more than the mere costs, and quoted Voet 22: 4, 11, and Merula (Manier van Procedeeren), L. 4, t. 37, c. 2, note 5 c.

The Attorney-General failed to state any circumstances to show that the defendant's denial proceeded either from ignorance or mistake.

The Chief Justice was not satisfied that the authorities applied. But Menzies, J., and Kekewich, J., held that the authorities quoted applied, and that the law as laid down there was now in force; and were of opinion that the defendant should be subjected to double costs.

Judgment:—Provisional sentence, with double costs.

10. KEYTER v. VILJOEN.

[31st August, 1836.]

A Promissory Note referring in its terms to an Antecedent Agreement "ex facie" unconditional, cannot in a Provisional Case be invalidated by Parole Evidence that such Agreement was Conditional and its Condition unfulfilled.

Keyter
v.
Viljoen.

In this case, the plaintiff claimed provisional sentence, in virtue of the following document:—

"Rds. 360.

"Three months after date, I, the undersigned, promise to pay to Mr. P. B. Swart, or order, the sum of Rds. 360, in consequence of an agreement, made before the Justice of the Peace, W. de Wet.

(Signed)

"H. C. VILJOEN.

"Worcester, 20th January, 1836.

"In my presence,

(Signed)

"W. DE WET."

The Attorney-General, for the defendant, alleged and stated that he could prove by parole evidence that the agreement referred to had only been a conditional agreement to pay Rds. 360, in the event of a certain inventory not being found, by which the amount which Viljoen was really indebted to Swart would be ascertained, and that this inventory had been since found, and that Viljoen would be enabled by it to prove that he was not indebted to Swart in so large an amount as Rds. 360, and maintained therefore that this was not a case for provisional sentence.

Keyter
v.
Viljoen.

Brand argued *contra*.

Menzies, J., and Kekewich, J., held that this note contained, *ex facie*, an absolute, unqualified, and unconditional obligation to pay Rds. 360, the agreement being referred to only as the antecedent circumstance in respect of which the parties had thought fit to enter into this absolute, unqualified, and unconditional obligation; and therefore gave provisional sentence.

The Chief Justice at first was of a different opinion, doubting whether the words "in consequence of," &c., &c., were not to be held as equivalent to the words "*under the conditions of an agreement*," &c. But afterwards he stated that he had very little doubt remaining as to the soundness of the judgment giving provisional sentence against defendant.

11. NORDEN v. MAGADAS.

[6th December, 1839.]

Provisional Sentence on a Promissory Note given by an Insolvent after Sequestration (under the Ordinance No. 64).

In this case, the Court gave provisional sentence against the defendant on promissory notes made by him after the date of the sequestration of his estate as insolvent.

Norden
v.
Magadas.

It was objected by the defendant that in consequence of that sequestration not having been wound up, but still remaining in force, he was not liable even to be sued, much less to have sentence given against him. But the Court held that the existence of the sequestration was no bar to action being brought or sentence being given for any *new* debt contracted subsequent to the sequestration; although the sentence could not be carried into execution against his property while under sequestration, nor probably against his person by decree of civil imprisonment, until the proceedings under the sequestration had reached the stage at which creditors under the sequestration may obtain a decree of civil imprisonment against the defendant.

12. COLLISON & CO. v. EKSTEEN.

[30th November, 1840.]

What is sufficient Consideration to support a Provisional Claim on a Promissory Note.

Collison & Co. This was a provisional claim, 1st, of £25, being the balance
v. due on the following promissory note :—
Eksteen.

“£70. “Cape Town, 1st June, 1840.

“Three months after date, I promise to pay to Messrs. F. Collison & Co., or order, the sum of £70, value received in coals. (Signed) “H. O. EKSTEEN.”

2dly. For £70, being the amount of the following note :—

“£70. “Cape Town, 1st June, 1840.

“Five months after date, I promise to pay Messrs. F. Collison & Co., or their order, the sum of £70, for value received. (Signed) “H. O. EKSTEEN.”

The Attorney-General admitted the debt in the first count, and in defence against the second put in an affidavit by defendant, that in June last, Galloway, the plaintiffs' agent, called on deponent and offered him 50 tons of coal, at £2 16s. per ton, which deponent agreed to take if it were of the same sort deponent had previously got from Galloway ; that thereupon Galloway requested the deponent, as he was very much in want of money, to give him a promissory note for £140, the price of the coal so purchased ; and, after some conversation, it was proposed by Galloway and agreed to by deponent, that instead of one note the two notes now sued on should be granted, as being more easily negotiable than one ; whereupon the deponent gave the notes now sued on. That a few days after the notes were signed, Galloway sent some coals to the deponent, which the latter immediately rejected, as not being the same sort of coals he had received from him before, but blacksmith's coals ; and that Galloway, a few days thereafter, sent the deponent 25 tons of good coals, which the deponent received ; and that deponent has only received value for one of the notes for £70 now sued for, and in part of which he paid £45, and that he hath received no value for the other of the said notes. That deponent made several applications to Galloway to have one of the notes returned to him, but that the said Galloway always made some excuses for not returning the same.

The plaintiffs admitted that the affidavit stated correctly the sale of the coals and the manner in which the two notes had been granted, and that the coals first sent had been rejected by defendant, but they did not admit that defendant had been entitled to reject them ; they admitted also that in consequence of the rejection, defendant had actually received only 25 tons of coals, and had not yet received the other 25 tons.

The Attorney-General maintained that the 25 tons of coals, which had been received by defendant, must be applied to the note in the first count, part of which he had paid, and the balance of which he now acknowledged to be due, and that the note in the second count must be considered as a transaction altogether distinct from the note in the first count. That therefore the second note must be held to have been granted without any consideration, no part of the contract in respect of which it had been granted to the plaintiffs having yet been fulfilled; and that as the plaintiffs admitted that the defendant had not received the second 25 tons, and had not shown, and could not in this provisional case prove that they had duly tendered performance of their part of the contract, they were not entitled to demand provisional sentence on a note so held by them, without having given consideration.

Collison & Co.
v.
Eksteen.

Cloete argued *contra*.

The Court held that the two notes must be held as one transaction, and the case decided as if one note for £140 had been given for the price of the coals, of which only one half had been received by defendant. That in the case of one note having been given for £140, the sale of the coals, to the maker of the note, at least with the delivery of a part of the coals, was a sufficient consideration given by plaintiffs to support the whole note, and the note was valid and binding on defendant; and that the mere fact of the failure of the plaintiffs to deliver a part of the coals, without any liquid evidence *instantly* to prove that this non-delivery was a default of the plaintiffs, was not a defence against provisional sentence,—which, therefore, the Court gave, with costs.

The Court gave no opinion as to what would have been the case if no part of the coals had been delivered, and that there had been liquid evidence sufficient to prove *instantly* that the non-delivery was a total default on the part of plaintiffs to fulfil their part of the contract (*vide* Fisher v. Daneel, p. 56).

13. ELLIOTT BROTHERS v. BRED A AND BEALE.

[30th November, 1840.]

Provisional Sentence in favour of a "bonâ fide" Holder against an Indorser in blank, who alleged Want of Consideration between him and the party to whom he delivered the Note for a specific purpose.

This claim for provisional sentence was founded on a promissory note for £30, made by the defendant Breda, in favour of the defendant Beale, or order, for value received, and endorsed by Beale in blank, of which the plaintiffs were the

Elliott Bros.
v.
Breda and
Beale.

Elliott Bros.
v.
Breda and
Beale.

holders, and which, not having been paid when due, had at their instance been duly protested for non-payment against both defendants. Breda did not appear, and provisional sentence was given against him.

Cloete, for Beale, put in an affidavit by Beale, in which he stated "that, in August last, he did call on the late E. Moore, then messenger of the Magistrate's Court of Cape Town, in order to settle a judgment which had been obtained in that Court against deponent by Messrs. Elliott Brothers, amounting to about £12 or £13, and then handed to the said Moore the promissory note in question to discount for this deponent, which Moore promised to do, and pay the judgment out of the same; that deponent frequently applied to Moore for the balance, and always received for answer, 'I have not yet got it discounted.' That deponent never received value for the note from Moore, and is totally ignorant of the manner in which the said Elliott Brothers came in possession thereof;" and objected to the provisional sentence on these grounds.

The Attorney-General, for plaintiffs, put in an affidavit of Thomas Elliott, stating "that in August last, the plaintiffs lodged for execution, in the hands of the said Moore, the messenger, a sentence, obtained by them against Beale, amounting, with costs, to £16 17s. 3d.; that Beale, in satisfaction of the said sentence, gave Moore the note in question; that subsequently, at the request of Moore, the deponent took the said note in satisfaction of the said judgment, and passed the balance of the said note, being £13 3s. 9d., to the credit of the said Moore, who agreed to settle with the said Beale for the said balance, and that the said judgment has never been paid or satisfied, except as before mentioned."

The Court held that the note having been given by Beale to Moore blank indorsed, the plaintiffs, or any third party were entitled to discount it for Moore for value, without being liable to any claim in respect of the note which Beale might have against Moore, for the whole or any part of the contents; that by taking the note in satisfaction of the judgment and passing the balance of it to the credit of Moore, the plaintiffs had given full value for the note; and that there was nothing in the circumstances of the case, as detailed in the affidavits, which placed them in a different or worse situation than they would have been in, had they paid the balance or the whole amount of this note to Moore in cash, and he had afterwards applied said cash in payment of a debt, due by him to the plaintiffs; and gave professional sentence, as prayed—(*vide* *Christian v. Elliott Brothers*, *infra*, "DEFENCE.")

14. LEVICKS & SHERMAN v. EKSTEEN.

[17th November, 1842.]

Provisional Sentence against the Maker of a Promissory Note, notwithstanding an allegation of Payment to the Payee after the Note became due,—the Note having been presented by the Holder to the Maker when long overdue.

This was a claim for provisional sentence on a promissory note for £200, made by defendant in favour of one Adriaan Louw, payable on the 8th of February, 1842, and by him blank indorsed, and now in possession of the plaintiffs. On the note was indorsed by Louw,

Levicks &
Sherman
v.
Eksteen.

"I acknowledge the presentation on the day when due.
"Cape Town, 8th February, 1842."

An affidavit was put in by the defendant, in which he swore that he had never heard of the indorsation to the plaintiffs before the 8th September, 1842; that no demand by the plaintiffs for payment had been made before that date; that, believing Louw to be the holder, he had, in April, remitted to him the amount of the note, at the same time demanding re-delivery of the note; and that Louw had received the remittance, and excused himself from re-delivering the note, first on the ground that the clerk was out of the way, and he could not then find it, and afterwards on other similar pretexts, until the 8th of September, when he became insolvent.

The Court held that the defendant had not shown such probable good grounds of defence as were sufficient to bar the *ex facie* liquid claim of the plaintiffs; and therefore gave provisional sentence, as prayed, with costs.

15. TRUTER v. HEYNS.

[9th February, 1843.]

Payment to the Payee of a Promissory Note is no answer in a Provisional Claim by the "bonâ fide" Holder.

This was a claim for provisional sentence on a promissory note, made by defendant, in favour of one Hapner, or order, and by him blank indorsed to the plaintiff, which had been discounted by the plaintiff before it was due with the bank, and which when due, had been retired by the plaintiff.

Defendant produced a receipt, dated 30th January, 1843, signed by Hapner, for the amount of the promissory note,

Truter
v.
Heyns.

Truter
v.
Heyns.

and alleged that the reason why he had not got the note back when he paid it was, that Hapner had told him he had, by accident, left the note in the country.

The summons was served on the defendant on the 30th January, 1843, when he stated to the messenger that he had paid the note.

The Court held that these facts afforded the defendant no defence against the plaintiff; and gave provisional sentence.

16. BIRKWOOD v. VAN ROOYEN.

[22d February, 1844.]

Provisional Sentence on a Promissory Note, where the Signature had been previously denied, and the Plaintiff had then failed to prove the same,—but refused for the Costs to which the Plaintiff was put by such Denial.

Birkwood
v.
Van Rooyen.

The plaintiff in this case claimed provisional sentence against the defendant,

1st. On a promissory note for £30, dated 12th November, 1840, payable six months after date, to John Rafferty, sen., signed G. J. van Rooyen,—as witness, John Rafferty, jun.;—and blank endorsed by J. Rafferty, “of which the plaintiff is now the legal holder.”

2dly. The further sum of £22 5s., which he owes the plaintiff as and for the taxed costs and charges incurred by him in proceeding against the defendant in the Supreme Court, for recovery of the amount of the said note, upon which proceedings the said defendant appeared and denied his signature affixed to the said promissory note;—and the plaintiff, not being then able to prove the signature of the said defendant, was, by judgment of the said Court, condemned to pay defendant's costs;—the plaintiff being now ready and willing to prove the signature of the defendant to the said note.

The plaintiff put in the promissory note and the record of the said judgment.

Defendant opposed provisional sentence being given, in respect of the following affidavit put in by him, in which he swore “that he did not sign the promissory note, for the recovery of which this action is brought, on the date and year therein set forth, and that he did not then or since receive value from the said John Rafferty, the elder, for the said note, and did not then owe said Rafferty the said sum of £30, and hath not since in any way become or been indebted

to the said Rafferty in the said sum of £30, and that he hath not to his, the deponent's, knowledge and recollection made and signed any promissory note for the like amount, in favour of said Rafferty, and that he hath been informed, and believes, that the plaintiff, clerk to the attorneys who have issued the summons, is a nominal plaintiff only, to recover the said £30 on behalf of the said John Rafferty, and that he has given no consideration whatever for the said note." Birkwood
v.
Van Rooyen.

It was admitted by plaintiff that he was acting on behalf of the executors of the deceased McKenny, the last indorser. The Court considered the case, therefore, in the same light as if the executors of McKenny had been the plaintiffs on record.

The Court held that the terms of the affidavit did not (and it was admitted by the defendant they were not intended to) import a denial that the signature on the note was the defendant's handwriting; the Court held also that the affidavit was not sufficient to bar the plaintiff's claim for provisional sentence on the note, the signature to which was not denied to be the writing of the defendant; and gave provisional sentence in respect thereof for £30, with costs, but refused provisional sentence for the £22 5s., the costs claimed by the plaintiff.

17. KILIAN & Co. v. TREDOUX.

[13th March, 1848.]

Provisional Sentence on a Promissory Note, notwithstanding an Error of Date appearing on the face of the Document.

In this case, the plaintiffs claimed provisional sentence upon a promissory note, signed by defendant in favour of the plaintiffs, which was described in the summons as "bearing date the 1st December, 1848, and payable on the 1st February, 1848." Kilian & Co.
v.
Tredoux.

The defendant did not appear.

The plaintiffs put in the note sued on, which was as follows:

"Cape Town, 1st December, 1848.

"Due 1st February, 1848.

"£104 6s. 0d.

"On the first day of February next, I promise to pay," &c.

The Court (Chief Justice absent on circuit) holding that the date of 1st December, 1848, was evidently a mistake for 1st December, 1847, gave provisional sentence, as prayed,

Kilian & Co.
v.
Tredoux.

but ordered execution thereof to be suspended until after the 12th April next. Notice of this sentence to be given by plaintiff to defendant by next post, or by being served on him within 14 days.

[Had it been brought under the notice of the Court that the summons only claimed £74 as the balance due on the note, and that there was a receipt by the plaintiffs for £30 endorsed on the note, it is most probable that the execution of the sentence would not have been suspended.]

18. NORDEN'S TRUSTEE v. BUTLER.

[12th July, 1848.]

Verity of Defendant's Signature, if denied, may be proved "instanter" by Parole Evidence.

Norden's
Trustee
v.
Butler.

In this case, the plaintiff claimed provisional sentence on a promissory note of the defendant.

Ebden, for defendant, put in an affidavit sworn by defendant, denying his signature to the promissory note sued on.

The Attorney-General, for plaintiff, offered to prove the verity of the signature *instanter*, by two witnesses.

Ebden objected that such proof could not be received by the Court *instanter*, and that a future day must be assigned by the Court for taking it.

But the Court overruled the objection, received the evidence of two witnesses, who proved the verity of the signature; and, in respect of that evidence, gave provisional sentence, as prayed, with costs.

CHAPTER II.

DOCUMENTS INSUFFICIENT PER SE FOR
PROVISIONAL SENTENCE.

1. ACCOUNT-CURRENT BY COMMISSION AGENT.
2. ——— SALES BY CONSIGNEE.

1. SMITH *v.* SOUTHEY.

[20th May, 1841.]

A Commission Agent who has rendered an Account of his Commission Sales, showing a Balance in favour of his Principal, cannot be sued for such Balance in a Provisional Case.

Provisional sentence was claimed on the following document, in the handwriting of and signed by the defendant, for the therein mentioned balance :—

Smith
v.
Southey.

“ J. O. Smith, in account-current with R. Southey.

Dr.				Cr.
1839.			1839.	
Aug. 25.	Cash paid carriage Rds.			By balance as per Rds.
	of Sugar	90 3 3		account rendered 728 6 1
Sept. 3.	Do. Sugar	167 4 0		
1840.	Do. Lead	66 0 0	1840.	
July 20.	Draft on M. & B.	873 0 0	Nov. 10.	Amount of account
Nov. 16.	My commission on			sales to 30th Oc-
	sales, 5 per cent.	159 2 0		tobor, 1841 ..
	Storeage 1 per cent.	31 6 3		3185 5 0
	Paid Coolies ..	17 4 0		
	Postages	3 1 2		
	Bal. down	2505 5 5		
		Rds..3914 3 1		Rds..3914 3 1

“ Graaff-Reinet, 10th November, 1840.

“ R. SOUTHEY.”

Defendant acknowledged his signature ; but maintained that this document did not entitle the plaintiff to claim provisional

Smith
v.
Southey.

sentence, as it had been rendered, not for the purpose of acknowledging that defendant was, at the time when he rendered it, indebted to the plaintiff for the balance, but merely to show the state of their accounts. That he was only an agent employed to sell, without a *del credere* commission, as was evident from the commission with which plaintiff was debited in the account-current; and therefore he was not bound to guarantee the payment of their debts by purchasers. That the item of Rds. 3185 5 sk. was not stated as the amount of proceeds of sales which had been received by the defendant; but merely the amount of sales which had been made, and a great part of the proceeds of which defendant had not received when he rendered the account. That this account had been transmitted by the defendant to the plaintiff in the following letter, which must be held as qualifying and explaining the account rendered:—

“Graaff-Reinet, 10th November, 1840.

“J. O. Smith, Esq.

“Dear Sir,—Enclosed I beg to hand you account sales and account-current to date: showing a balance in your favour of Rds. 2505 5 sk. 3 st. Much of this is owing by traders now beyond the Orange River, but daily expected, and one who has just returned, but not yet disposed of his cattle, &c. However, I will make you a remittance out of part, &c.

“Yours truly,

“R. SOUTHEY.”

Plaintiff admitted the letter; and that, since the 10th November, defendant had remitted to the plaintiff £131 14s. 6d.

The Court, on the grounds pleaded by the defendant, refused provisional sentence, with costs, including the costs of the affidavit verifying the copy of the above letter, but not of other affidavits, which had also been tendered.

2. TRIMBEY v. HARRIS.

[12th July, 1841.]

An Account-sales rendered by a Consignee is not a Document sufficiently Liquid for Provisional Sentence.

Trimbey v.
Harris.

The Attorney-General, for the plaintiff, claimed provisional sentence against the defendant for £119 4s., being one-half of

the net sum mentioned in an account-sales, signed and rendered by the defendant, of the material part of which the following is an extract:—

Trimbey
v.
Harris.

“Account-sales of 200 barrels flour received per *Esperance*, and sold as under, on account and risk of Messrs. George Trimbey and Ralph Harris, of London, by Henry Ralph Harris.

177 barrels American flour à 36s. . .	£318 12 0
23 do. damaged,—less expenses,	31 16 6 $\frac{1}{2}$
	<hr/>
	£350 2 6 $\frac{1}{2}$

Charges.

Here follows a list of the charges, which included a charge for commission and guarantee of 7 $\frac{1}{2}$ per ct., and amounted to

£111 14 1 $\frac{1}{2}$
<hr/>
£238 8 5 $\frac{1}{2}$

E. & O. E.

Cape Town, Cape of Good Hope,
January 23, 1841.

(Signed) “HENRY R. HARRIS.”

The Court held, that a mere account-sales rendered by a consignee to his consignor was not a liquid document of debt, furnishing evidence that the consignee was indebted to the consignor in the sum stated therein to be the net amount of the proceeds of the sale of the goods consigned, and sufficient *per se* to support a claim for a provisional sentence; because it was merely a statement of the result of a transaction effected by the consignee for the consignor; and contained nothing from which could be implied an acknowledgment by the consignee that the net amount of proceeds was the balance which, at the date of the bill of sales, was due by the consignee to the consignor, or an undertaking to pay that amount on demand. Such an account-sales was in a different situation altogether from an account in which a balance is brought out as due by one of the parties, and which has been signed by that party. The practice of trade constantly requires that account-sales should be rendered by one of two parties who are in a course of dealing with each other, and between whom there is an open account-current, without reference to whether the balance on that account-current is or is not, at the time, against the party rendering the account-sales. On these grounds the Court unanimously refused provisional sentence, with costs.

- | | | |
|----|---|-------------------------|
| 1. | ACKNOWLEDGMENT OF DEBT—ILLIQUID FOR WANT OF | |
| | | CESSION. |
| 2. | — | — WITH CONDITIONAL PRO- |
| | | MISE OF PAYMENT. |
| 3. | — | — DITTO. |
| 4. | — | — THEFT. |

1. REITZ v. KOCK.

[1st April, 1828.]

An Acknowledgment of a Balance due is not a Negotiable Instrument without a Cession.

Reitz
v.
Kock.

Provisional sentence was refused on a document, dated 6th December, 1823, on the ground that it was merely an acknowledgment of a balance as due by defendant to one Barry, and not to the plaintiff; that therefore it was not a negotiable instrument without a formal cession; and that there was no transfer or cession of it to the plaintiff, as alleged in the summons.

2. FISCHER v. DANEEL.

[1st June, 1833.]

An Acknowledgment of the Purchase of Goods "ex facie" of the Document to be delivered only under certain circumstances, the Proof of which must be extrinsic, coupled with a Promise of Payment, is not a Liquid Document.

Fischer
v.
Daneel.

Provisional sentence was claimed by the plaintiff in virtue of the following document:—

"I, the undersigned, acknowledge to have purchased of Mr. H. Fischer ten young asses, *which will be fit to draw in the wagon by the month of September next*, for the price of Rds. 150 each; from which amount is deducted, as part payment a bond, due by the said Mr. Fischer, of Rds. 344, with 4½ months' interest, and also Rds. 400 for a saddle-horse, making together the sum of Rds. 752 3 sk. 2 st., leaving a balance of Rds. 748, which I promise to pay in the month of December of the present year.

"Stellenbosch, 13th January, 1832.

"B. R. H. DANEEL."

The defendant objected that delivery of ten asses fit to draw in a wagon had not been offered to him in September, 1832, nor since.

Fischer
v.
Daneel.

Plaintiff maintained that this was a liquid document, sufficient to warrant a provisional sentence in his favour.

Defendant maintained that, as this document did not instruct either the delivery or even the tender of ten proper asses, both of which he denied, and the actual non-delivery of which (from whatever cause, either the fault of the plaintiff or defendant, it may have proceeded) was proved by the tender of ten asses now made in the summons by plaintiff, the plaintiff had failed to support his claim by any liquid document, and was, therefore, not entitled to provisional sentence.

Menzies, J., and Kekewich, J., held the defence to be good. The Chief Justice held the contrary opinion.

Provisional sentence refused, with costs (*vide* Collison v. Eksteen, p. 46).

3. STURT v. CARTER'S EXECUTOR.

[8th June, 1848.]

An Acknowledgment of a Debt, with a Promise of Payment on a Contingency which has not necessarily occurred, is Illiquid.

The plaintiff in this case claimed provisional sentence against the defendant, as executor dative in this colony of the deceased Major Henry Carter, on the following document:—

Sturt
v.
Carter's
Executor.

"I hereby acknowledge to have received from Lt. Sturt a draft on Messrs. Denny, Clark, & Co., for the sum of pounds sterling three hundred, which I promise to pay immediately on my return to Bengal, with interest at 6 per cent., unless the said sum should have been previously liquidated through Major Henderson, of the firm of Carr, Tajore, & Co.

"H. CARTER, Major, 73rd Inft.

"Cape Town, 18th November, 1842."

Across the face of this document was written—

"Calcutta, 4th December, 1844.

"No. 4. Registered as a claim against the estate of Major H. Carter, for £300.

"J. P. MCKILLIGAN, Administrator."

It was admitted that Major Carter, previous to 1842, had come to this colony on leave from India,—had brought his family here,—and established them on a farm which he had

Sturt
v.
Carter's
Executor.

bought,—that in the end of 1842 he returned to India, leaving his family here, solely for the purpose of receiving the arrears of pay which had become due to him during the period of his leave, and of retiring from the service,—and that he intended immediately to return to this colony and settle here. He died suddenly, soon after his return to India, where letters of administration of his estate were granted to McKilligan. On his death being known here, the defendant was appointed executor dative of his estate, and letters of administration were granted to him in the usual form. It was admitted that the plaintiff had made a claim on the estate, on the above document, to McKilligan in India.

Ebden, for the defendant, first objected, and so the Court found, that this document was not a liquid document of debt, sufficient to support a claim for provisional sentence, seeing that its being now in the possession of the plaintiff did not raise even a presumption that the debt was still due and had not been previously paid in Bengal, or through Major Henderson, and that whether it had been so previously paid or not was a fact which was not necessarily within the knowledge of the defendant, as executor, so as to enable him, if true, to prove it.

Provisional sentence was therefore refused, with costs.

Ebden also objected that the plaintiff, having elected to claim and having claimed against the executor in India, was barred from claiming also against the executor here; and 2dly, that Major Carter having died in India, India was the proper forum in which claims against his estate should be made.

The Court having decided the case on the ground above stated, gave no decision on those two objections, but were inclined to pay little regard to the first. They were also decidedly of opinion that at the time of Major Carter's death, his proper domicile was in this colony, and consequently, that claims against his estate might competently be made against his executor in this colony.

4. BARRY & CO. v. MANUEL.

[12th January, 1848.]

Provisional Sentence refused on a Document wherein the Defendant admitted having stolen the Amount claimed by the Plaintiffs.

Barry & Co.
v.
Manuel.

The summons in this case prayed for provisional sentence against Stoffel Manuel, prisoner in the gaol of Caledon, for the sum of £26, with interest from the 25th September, 1847, "which he owes to and unjustly detains from the plaintiffs,

being the balance of a certain sum of money which he wrongfully and unlawfully took away, or stole, from the plaintiffs, on or about the 25th September, 1847, as appears by a certain acknowledgment in writing, bearing date the 16th November, 1847, signed by the said Stoffel Manuel."

Barry & Co.
v.
Manuel.

The defendant did not appear.

Watermeyer, in support of the plaintiffs' claim, put in the following document:—

"I, Stoffel Manuel, do declare that, on or about the 25th September last, I took from the iron chest of Messrs. Barry & Nephews' store, at Breda's Dorp, £61, all in gold money, £35 of which I returned to Mr. Helm.

"STOFFEL MANUEL.
His + mark.

"Witness thereto, J. IRISH.

"Before me, at Caledon, 16th Nov., 1847.

"J. NEEDHAM, J.P."

The Chief Justice and Musgrave, J., held that this document was not such a liquid acknowledgment of debt, or promise to pay, as was sufficient to support the plaintiffs' claim for provisional sentence, which they refused accordingly.

Menzies, J., thought it was sufficient, and that provisional sentence ought to be granted.

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1. ATTORNEY'S BILL OF COSTS—WITHOUT NOTICE OF TAXATION.
 2. ———— WHEN INSUFFICIENT.
-

1. DE WET v. MEYER.

[28th February, 1834.]

Provisional Sentence refused on a Bill of Costs, where it did not appear that the same had been Taxed in the Presence of the Party.

In this case, provisional sentence was sought by an attorney against his client for the amount of two bills of costs, which had been taxed.

De Wet
v.
Meyer.

Cloete, for the defendant, objected that the bills had been taxed in the defendant's absence, without any notice having been given of the taxation.

De Wet
v.
Meyer.

The Court refused provisional sentence, in respect that no sufficient evidence was produced that the bills had been taxed in defendant's presence, or after due notice had been given to him to attend the taxation.

[The same judgment was given this day in the case of Truter and another v. Grimbeek, although no appearance was made for the defendant.]

2. DICKSON v. GILDENHUYS.

[13th July, 1846.]

Provisional Sentence refused in favour of an Attorney against his Client, the Plaintiff in a previous Action, on a Taxed Bill for the Costs in that Action which the Defendant therein had been condemned but had failed to pay.

Dickson
v.
Gildenhuys

The defendant, Gildenhuys, in this case, was summoned to render to the plaintiff, Dickson, £1 11s. 3d., which it was alleged he owed to the plaintiff upon and by virtue of a certain bill of fees and disbursements due to the said plaintiff, as the attorney duly qualified by a warrant of attorney, signed by the said defendant, on the 20th November, 1843, in favour of the said Dickson, in a certain clause, lately pending in the Supreme Court of this colony, wherein the said defendant, Gildenhuys, was the plaintiff, and one P. J. Anderson was the defendant, and "which bill has been duly taxed and allowed by the Master, as appears by the allowance at the foot thereof." The summons also called on the defendant to acknowledge the signature affixed to the said warrant, or the validity of the said debt, and to plead to the provisional claim of the said plaintiff.

The fact was, that Anderson, the defendant in the original action, who had been condemned to pay to Gildenhuys the costs incurred by him in that action, had not funds sufficient to pay these costs to the present plaintiff, who therefore sought to recover them from his client, the defendant in this action.

But the Court held, that neither the nature of the alleged debt now sued for, nor the documents relied on in support of it, were sufficient to entitle the plaintiff to obtain provisional sentence against defendant. Whereupon the action was allowed to be withdrawn, with costs of *comparuit* to defendant.

- | | | |
|----|---|-----------------------------------|
| 1. | BILL OF EXCHANGE—ACCEPTED BY PARTY SUBSEQUENTLY | |
| | INSOLVENT. | |
| 2. | — — — — — | DISHONOUR OF |
| 3. | — — — — — | PAYABLE AT A PARTICULAR PLACE. |
| 4. | — — — — — | PAYABLE ON A CONTINGENCY. |
| 5. | — — — — — | LIABILITY OF DRAWER. |
| 6. | — — — — — | POSSESSION OF, BY JOINT ACCEPTOR. |
| 7. | — — — — — | ACCEPTED BY "MARK." |
| 8. | — — — — — | CONDITIONAL.—PRESENTMENT. |
| 9. | — — — — — | DUE NEGOTIATION OF |

1. THOMSON & Co. v. ARCHER.

[1st December, 1829.]

Presentment of a Bill of Exchange must be proved, although the Acceptor became Insolvent before the Bill was due, in a Provisional Claim against the Drawer.

The Court refused provisional sentence against the drawer of a bill of exchange, accepted by a party who had become insolvent, and had been sequestrated, before the day of payment, on the ground that no proof of presentment for payment was brought.

Thomson & Co.
v.
Archer.

✓ 2. DE RONDE v. ZEILER.

[31st August, 1833.]

Parole Evidence is not Competent to prove the Dishonour of a Bill of Exchange.

This was a claim for provisional sentence on the following bill by the payee against the drawer:—

"Rds. 367. "Cape Town, 14th March, 1833.

"Please to pay to Mr. B. de Ronde, or order, the sum of Rds. 367, for value received; by so doing you will oblige

"Your obedient servant, J. J. ZEILER.

"Mr. F. HEINENBERG, Cape Town.

(Accepted) "F. P. HEINENBERG."

Cloete, for the plaintiff, offered to call a witness to prove dishonour.

The Court held that the plaintiff could not have judgment without proving dishonour, and that parole evidence was inadmissible to prove it, so as to sustain the provisional claim; and refused provisional sentence. Costs to remain costs in the cause (*vide* Anderson v. Hutton, p. 75).

De Ronde
v.
Zeiler

3. SIMPSON BROTHERS & Co. v. ALLINGHAM. -

[16th December, 1834.]

Provisional Sentence refused against the Acceptor of a Bill of Exchange payable at a Particular Place, because presentment at such place was not duly alleged and proved.

Simpson
Brothers & Co.
v.
Allingham.

In this case, the summons was for provisional sentence on a bill of exchange accepted by the defendant, which, in the body of the bill, was made payable six months after date, at the house of J. Jearey, in Waterkant, Cape Town. The summons did not allege any presentment for payment at Jearey's house.

The summons had been served on the defendant by leaving a copy of it at his residence (Jearey's said house) with Jearey.

The Court, in respect that the summons did not aver presentment at the place of payment specified in the bill, refused provisional sentence, leaving the plaintiff to proceed with the principal case; but gave no opinion as to what, in the principal case, would be the effect of the want of such presentment.

Defendant did not appear.



4. GEERT v. VAN AS.

[26th May, 1835.]

A Bill or Order payable on a Contingency respecting which extrinsic Proof would be required, is Illiquid.

Geert
v.
Van As.

The plaintiff claimed provisional sentence on the following document, signed by defendant:—

“Mr. A. P. Herhold will be pleased to pay to the holder hereof the sum of Rds. 276 2sk. 5 st., so soon as he shall have received my interest on the 1st April, 1835, from Mr. G. E. Overbeek, and to place the same to the account of

“His obedient servant,

(Signed)

“W. R. VAN AS.

“Cape Town, 2d December, 1834.”

“So soon as the money is received by me, I will immediately pay the same to the holder.

(Signed)

“A. P. HERHOLD.”

The defendant did not appear.

The plaintiff alleged, and offered to prove, that defendant had himself received the interest.

But the Court, doubting whether this document, being only made payable on a contingency, could be sued on as proof *per se* of a debt due by the defendant to the plaintiff, and being of opinion that proof of the facts alleged could only be given in the principal cause,—refused provisional sentence on the document.

Geert
v.
Van As.

5. NORDEN v. STEPHENSON.

[31st August, 1835.]

The Drawer of a Bill of Exchange is not provisionally liable to the Acceptor who has paid the Bill.

This was a claim for provisional sentence against defendant on two bills drawn by him on the plaintiff, and accepted and paid by the plaintiff when due.

Norden
v.
Stephenson.

The bills were in the following terms:—

“Graham’s Town, September 9, 1834.

“Eight months after date, pay to Messrs. Meurant, or order, the sum of £13 11s. 5d., for value received.

“JAMES H. STEPHENSON.

(Accepted) “B. NORDEN.”

Defendant did not appear.

But the Court held that the bills did not afford any evidence that defendant was indebted to plaintiff, as it did not appear from them that the acceptor had not funds of the drawer in his hands: and therefore dismissed the case.

6. GIE v. DE VILLIERS.

[23d December, 1835.]

The Possession of a Bill of Exchange by one of three Joint Acceptors, coupled with an Acknowledgment on the face of the Bill from the Holder that the Amount had been received from him, does not afford such Presumption of Payment by this one only as to entitle him to sue the other two provisionally for their Shares.

In this case, the claim against the defendant for provisional sentence was founded on a bill drawn on and accepted by the defendant, the plaintiff, and another person, jointly

Gie
v.
De Villiers.

Gie
v.
De Villiers.

and severally, and alleged to have been paid by the plaintiff, who now claimed from the defendant one-third of the amount.

There was written across the face of the bill—

“Received the amount from J. C. Gie, M’s son (the plaintiff).
“R. LOEDOLFF, Cashier.

“Bank, 17th November, 1834.”

The Court were unanimously of opinion that this receipt or writing on the bill was no evidence of the fact that the plaintiff had paid the bill, and that it could not be received as evidence at all.

Menzies, J., held that the fact of the possession of a bill, accepted by three persons jointly and severally, by one of the acceptors after the term of payment had arrived, was *presumptio juris* evidence that this acceptor, who was in possession of the bill, had paid it, and consequently there was here *primâ facie* evidence of the plaintiff’s cause of action against the defendant.

[On further consideration he afterwards came to doubt the soundness of this opinion, and was inclined to concur in the opinion of the majority.]

Chief Justice and Kekewich, J., were of a different opinion as to the legal effect of possession of a bill by a joint acceptor, and therefore held that the plaintiff had produced no evidence whatever of his cause of action; and dismissed the claim for provisional sentence (*vide infra*, Neethling v. Hamman, p. 71).

7. CARSTENS v. HENDRIKS.

[2d February, 1836.]

Provisional Sentence refused against one of the Drawees of a Bill of Exchange, of whose Acceptance, alleged to be by “Mark,” no Evidence appeared “ex facie” of the Document.

Carstens
v.
Hendriks.

In this case, the summons for provisional sentence against the defendant, Jan Hendriks, set forth as the ground of debt “a certain assignation drawn by one August Hendriks jointly and separately on, and accepted by, the said Jan Hendriks and Daniel Jacobus Hendriks, in favour, &c., &c.; then summon the said Jan Hendriks, &c., &c.; and also to acknowledge or deny the several signatures and marks or crosses affixed to the said assignation.”

Defendant did not appear.

Cloete, for the plaintiff, produced, as the document of debt, the following

Carstens
v.
Hendriks.

[TRANSLATION.]

"12th August, 1834.

"Rds. 466 5 sk. 2 st.

"Int. 28 0 0

"Rds. 494 5 2

"On the 2d of August, 1835, please, as well jointly as each separately, to pay to Mr. Adam Carstens, or order, the sum of Rds. 494 5 sk. 2 st., for value received, and place the same to account of

"Your servant,

This x mark is
the signature of
"AUGUST HENDRIKS.

"In my presence,

JOH. BRINK, D.s.

"To Messrs. JAN HENDRIKS and

DANIEL JACOBUS HENDRIKS."

Across the face of the bill was written—

"Accepted, x x x D. J. HENDRIKS."

The Court refused provisional sentence, in respect that it did not in any way appear, *ex facie* of this document, that the defendant, Jan Hendriks, had ever accepted the bill even by his mark, and refused to receive parole evidence that one of these crosses was his mark.

8. NORTON v. SPECK AND ANOTHER.

[19th November, 1840.]

An Acceptance of a Bill payable on a Contingency requiring Extrinsic Proof, is Illiquid.—Non-allegation of Presentment to the Acceptor in the Summons is sufficient to bar Provisional Sentence against the Drawer of a Bill of Exchange.

In this case, plaintiff claimed provisional sentence against both defendants on the following note:—

"£23 12s.

"Office of Ordnance,
"Cape Town 5th April, 1840.

"At four months from this date pay to Mr. Kisch, or order, the sum of £23 12s. out of my pay that will become due.

(Signed) "A. SPECK.

"R. M. SATCHWELL, Esq.,

Cashier, H. M. Ordnance Department.

(Accepted) "R. M. SATCHWELL.

(Indorsed) "H. B. KISCH.

"H. B. KISCH & Co."

Norton
v.
Speck and
Another.

Norton
v.
Speck and
Another.

It was objected for Speck that no allegation was made in the summons served on him that the bill had been presented to the acceptor, and payment refused, and that, in point of fact, no such presentment had been made, or at least no notice of it had been given to Speck, the drawer.

It was objected for Satchwell that he had only undertaken to pay the bill out of pay which might be due to the drawer, and might be in his, the acceptor's, hands when the bill became due; and there was no evidence that any pay was due to the drawer or in the acceptor's hands.

Provisional sentence was refused against both defendants.

✓ 9. PHILLIPS & KING v. RIDWOOD.

[11th February, 1841.]

Provisional Sentence refused against the Drawer of a Bill of Exchange payable after sight, in respect that there was no Protest alleging Presentment for Acceptance or Sight to the Drawer,—though a Protest for Non-payment was produced.

Phillips &
King
v.
Ridwood.

This was a claim for provisional sentence on the following bill of exchange :—

“ No. 1836.—Due 11th November.

“ No. 1.—£40.

“ Cape Town, 22d June, 1840.

“ At ten days after sight, pay this my first of exchange (second and third unpaid), to the order of Mr. H. C. Heurtley, the sum of £40, for value received, which place to the account of

“ THOMAS RIDWOOD.

“ To J. S. FOREMAN, Esq.,
Ordinance Agent, Cape Town.

“ 2s. 6d. A. C., 29th October, 1840.

“ 15s. 6d. A. C., 11th November, 1840.

(Indorsed) H. C. HEURTLEY.

“ Pay to the order of Messrs. Phillips, King, & Co.

“ PHILLIPS & KING.”

The words "Mr. Foreman is out of town; Mr. Ridwood has overdrawn his account, therefore cannot accept any more bills. Noting 2s. 6d.;" and the words "Will not be paid. Noting and protesting 15s. 6d.;"—were written on separate slips of paper, pasted on the lower corner of the bill.

Phillips &
King
v.
Ridwood.

The protest for non-payment made no mention of any presentment for acceptance or sight, but merely stated that, on the 11th November, 1840, the bill was presented and payment demanded, and an answer given, "Will not be paid."

The defendant did not appear.

The Chief Justice raised an objection to granting provisional sentence, on the ground that there was no evidence of the bill having been presented for sight or acceptance before payment was demanded, and therefore no proof of due negotiation; and consequently that, as the plaintiffs had not proved due negotiation, they were not entitled to claim provisional sentence.

Menzies, J., held, 1st, that the possession of the bill by the plaintiffs, with a protest for non-payment, was sufficient to give them a right to sue for and recover provisional sentence, unless the defendant appeared and alleged want of due negotiation, in which case the plaintiffs must prove due negotiation; and that, as the defendant did not appear and object want of negotiation, it must be presumed there was no ground for such an objection, and it was not the duty of the Court to raise the objection, presume grounds for it, and sustain it in the absence of the defendant. 2dly. That the protest for non-payment afforded a ground for presuming that *omnia erant rite et solemniter acta*, and therefore was to be taken as *primâ facie* evidence that presentment for acceptance or sight had been made. 3dly. That the noting on the bill 2s. 6d. A. C., 29th October, 1840, 15s. 6d. A. C., 11th November, 1840, and the slip having on it "Mr. Foreman," &c., were *primâ facie* evidence of presentment for acceptance, which ought to be given effect to in the absence of any evidence to the contrary; and that the insertion of those notings and the words on the slip on the copy of the bill, made by the protesting notary on the back of the protest for non-payment, with whose name the initials A. C. in the notings corresponded, was, in the absence of any allegation to the contrary, equivalent to a notarial attestation that the noting for non-acceptance had been duly made after presentment for that purpose; and was of opinion that provisional sentence should be given, as prayed.

But the majority of the Court decided otherwise, and refused provisional sentence.

1. BOND—MORTGAGE, COUNTERPART NOT PRODUCED.
2. — TO “RECKON FOR” A CERTAIN SUM.
3. — OF SECURITY FOR DEFICIENCY BY PUBLIC OFFICER.
4. — HAVING REFERENCE TO COLLATERAL DOCUMENT.
5. — NOTICE ON DEATH OF DEBTOR.
6. — INDEMNIFYING SURETY TO ANOTHER BOND.
7. — PAYMENT OF, BY CO-SURETY.
8. — BY PREVIOUS HUSBAND IN COMMUNITY OF DEFENDANT’S WIFE IN COMMUNITY.

1. ILES, qq., AND LAWRENCE v. MARTIN.

[1st April, 1828.]

Provisional Sentence refused on a Mortgage Bond, the Counterpart, in the hands of the Creditor, not being produced.

Iles, qq., and
Lawrence
v.
Martin.

In this case, provisional sentence was refused, with costs, on a mortgage bond over immoveable property, passed before a Commissioner of the Court of Justice, the *counterpart of the bond* not being produced by plaintiff, who alleged that it was mislaid (*vide* Deneys v. Stoffling, *supra* p. 16).

2. JONES v. DUSING.

[10th September, 1828.]

A Bond in which the Debtor binds himself “te verrekenen,” or “reckon for,” a certain Sum with his Creditor is not a Liquid Document of Debt.

Jones
v.
Dusing.

A bond, in which the defendant bound himself (not to pay to) but (*verrekenen met A.*) to *reckon for, account for, or settle for*, a certain sum with A., was found not to be such a liquid document of debt as to entitle B., the assignee of the bond, to claim provisional sentence on it, it being admitted that no settlement of accounts or reckoning had taken place between defendant and A., posterior to the date of the bond.

The Chief Justice doubted whether the above interpretation of the words “*verrekenen met A.*” gave the true legal meaning of that term.

3. SUTHERLAND *v.* SNELL.

[31st March, 1831.]

A Judgment obtained against an Office-holder for a Deficiency in the Accounts of his office, on his own Admission, is no Evidence to warrant Provisional Sentence for the Amount of such Deficiency against the Party who had bound himself as Security for any Deficiency which might be caused by the Default of such Office-holder.

In this case, provisional sentence was refused against the defendant, who had bound himself as security for Korsten, a vendue-clerk, in favour of the vendue-masters, for any deficiency or loss which might be occasioned to the vendue-masters by any acts of Korsten, in his capacity as vendue-clerk, on the ground that no evidence had been produced to show the amount of such deficiency or loss, or that any had been occasioned, sufficient to warrant a provisional sentence; the Court holding that the sentence which had been obtained against Korsten, on his own admission, for the sum now claimed, being *res inter alios acta*, could not be taken as *res judicata* in a question with the defendant, who had not been a party to that action, and was therefore now entitled to object to the amount of the claim.

Sutherland
v.
Snell.

4. MEYER *v.* GOEK.

[20th March, 1832.]

Provisional Sentence refused on a Bond referring to the Balance of an Account-current as the "causa debiti," the said Account-current, on production, not showing any Debt due.

In this case, provisional sentence was claimed on the following bond:—

"I, the undersigned, J. Goek, as administrator of the firm of Niepoth & Meyer, at Cradock, do hereby acknowledge that, according to the account-current drawn up by me and closed this day, I was deficient in my balance the sum of Rds. 6862 5 sk. 5 st., whereof, according to the said account, a third of the profits has been provisionally awarded to me for the administration I held, and from which it appears that I am obliged to pay the firm a sum of Rds. 3067 2 sk. in cash, which sum of Rds. 3067 2 sk. I promise to pay to the said Messrs. L. Niepoth & J. Meyer, or their order, in the following manner, &c., &c. (Signed) "JOHN GOEK."

Meyer
v.
Goek.

The defendant opposed provisional sentence, on the ground that, *ex facie* of the account now produced by him, and admitted by plaintiff to be that referred to in the bond, it not

Meyer
v.
Goek.

only did not appear that he was indebted in that sum, but there were errors manifest *ex facie* of the account, from which it appeared that a balance was due to him; and proposed to call Mr. Prince, as an accountant, to point out how those errors had originated.

The majority of the Court (Chief Justice and Menzies, J.) refused the provisional sentence, on the ground that the account-current, being referred to in the bond, must be held as if it had been recited in the bond, and must be held as the *causa debiti*.

That this account-current did not clearly show that the defendant was indebted to the plaintiff in any amount whatever; consequently the *causa debiti* set forth in the bond did not show that any sum was due, and therefore that the plaintiff had not established a liquid debt.

They refused to admit Mr. Prince's evidence as being incompetent, because, if the documents founded on in support of the claim *ex facie* established a liquid claim, it was incompetent to receive parole evidence respecting matters therein stated or contained to refute them in the provisional action; and if *ex facie* they did not establish a liquid claim, it was unnecessary and irrelevant to admit parole evidence to show that the claim was not liquid.

Burton, J., dissented, on the ground that the action was brought on the bond, and that, although it was competent for the defendant to produce the account to show that he was really not indebted in the sum in this bond, still that, as the account was in such a state that it was impossible to discover from it whether the defendant was or was not indebted in the sum in the bond, the account-current was insufficient to support a defence against the *ex facie* liquid obligation in the bond.

5. SMUTS v. EXECUTORS OF HAUPT.

[17th December, 1833.]

Where a Bond stipulates Three Months' Notice, it does not become payable on Demand on the Debtor's Death, but the Notice must be given to his Executors.

Smuts
v.
Executors of
Haupt.

This case was dismissed, with costs, because the bond on which provisional sentence was sought stipulated that payment should not be due until after three months' notice to pay had been received by the debtor; and no such notice had been given.

De Wet, for plaintiff, contended, but ineffectually, that the original debtor having died, the executor was bound to pay on demand without receiving any notice (*vide* Southey v. Executor of Dormehl, p. 22).

6. CLOETE v. EKSTEEN.

[1st December, 1834.]

A Surety to a Bond who, having paid the debt due by the Principal Debtor, had obtained Cession of the Bond from the Creditor, cannot sue provisionally on a Deed of Indemnity by the Defendant, holding him, the Surety, harmless in case of such Payment,—the Payment being incapable of Proof without Evidence Extrinsic of the Deed of Indemnity.

In this case, provisional sentence was claimed for £217 3s. 1d. upon a certain deed of indemnity, signed by the defendant, dated 13th September, 1828, whereby she bound herself to indemnify and hold harmless the plaintiff for such sum as he might have to pay upon a certain notarial bond, passed by Van Oudtshoorn, as principal debtor, in which the plaintiff had become surety and joint-principal debtor, on which bond the summons alleged that plaintiff had been compelled to pay the said sum of £217 3s. 1d., in consequence of the insolvency of Van Oudtshoorn.

Cloete
v.
Eksteen.

Provisional sentence was refused by the Court, on the ground that neither the bond, for the indemnification of the surety in which the deed of indemnity sued on had been granted by the defendant, nor the cession in the former was *per se* legal evidence of the payment of the former by the surety, and that this fact could not be proved without extrinsic evidence; consequently that the case was not one in which provisional sentence could be given.

The plaintiff therefore withdrew the claim for provisional sentence (*vide* Neethling v. Hamman, next case).

7. NEETHLING v. HAMMAN.

[23d December, 1834.]

Possession of a Bond by one of two Sureties, with an Acknowledgment by the Creditor that he had received Payment of the whole from this one, is not sufficient Evidence of Payment by such Surety to entitle him to claim Provisional Sentence against his Co-Surety for the Moiety.

On the 6th August, 1822, defendant and plaintiff executed a notarial bond, binding themselves *in solidum*, as sureties and joint-principal debtors, for the prompt payment of a sum of f3000, "which D. Bosman intends to raise from the Directors of the Lombard Bank, under special mortgage of his freehold

Neethling
v.
Hamman

Neethling
v.
Hamman.

place *Onrust*, renouncing, &c., and binding themselves, at all events if required, to pay and discharge the debt, hereby guaranteed by them as their own so long as the directors of the said bank shall think proper to prolong the time of payment thereof."

On the 27th February, 1826, Bosman executed a bond in favour of the Lombard Bank, for £3000, and mortgaging a certain piece of freehold land, &c., situated in the district of Stellenbosch, as per deed of transfer, dated 7th April, 1820.

The plaintiff, alleging that he had been called on by the bank to pay the debt, and that he had paid it with the interest due thereon, amounting to £88 6s. 3d., on the 19th December, 1833, brought this action against the defendant, his co-surety, in order to recover provisional sentence against him for the moiety of the sum paid by him to the bank.

The defendant did not appear.

The plaintiff, in support of his claim, produced the bond executed by him and the defendant on the 6th August, 1822, and the bond executed by Bosman in favour of the bank, on the 27th February, 1826, having indorsed thereon as follows: "Received from Mr. Pieter G. Neethling, N. L. son, the sum of £88 6s. 3d. in full of the foregoing capital together with the interest since 1st January, 1831, up to this date, entitling him to recover his moiety from his co-surety, Dirk Hamman, J. N. son.

" Capital.....	£75		
" Interest from 1st January, 1831..	13	6	3

" Lombard Bank, 19th Dec., 1833	£88	6	3
---------------------------------	-----	---	---

" D. L. LEHMAN, Cashier."

The Court were of opinion that this alleged receipt could not *per se* be received as evidence, and therefore the plaintiff had produced no evidence of his having paid the debt to the bank, and accordingly refused provisional sentence (*vide* Cloete v. Eksteen, p. 71; Gie v. De Villiers, p. 63).

8. BURTON, N. O., v. VIVIER.

[12th July, 1844.]

Provisional Sentence refused against the Defendant, who was summoned on a Bond, as married in Community to the Widow, who had been married in Community to the Original Debtor on the Bond.

Burton, N.O.,
v.
Vivier.

The summons in this case, in which provisional sentence was claimed, commanded

" J. F. Vivier (the defendant), married in community of

property to Isabella, widow of the late L. H. Jordaan, with whom she was married in community of property, to render to plaintiff £27, which he owes the said plaintiff, being for interest from the 1st July, 1842, to 1st January, 1844, due upon and by virtue of a certain mortgage bond, dated 12th January, 1827, for £300, passed and executed by the said J. H. Jordaan, &c., &c.; and serve on the said Vivier a copy of this summons, *and of the said mortgage bond.*"

Buston, N.O.,
v.
Vivier.

(Copy of no other document was served.)

Defendant did not appear.

Plaintiff put in the said mortgage bond, and closed his case.

The Court held that although the defendant's non-appearance is, in law, equivalent to his admission that he possesses the character in which he is sued, namely, that he is the husband of his wife Isabella, and is married in community of property with her,—and the mortgage bond proves that Jordaan originally was, and his representatives now are, liable to pay the sum claimed, yet that the plaintiff has failed to prove that defendant's wife was the wife of Jordaan, or that she was married in community of property with him, or that she is now liable for any part of the debt in the bond;—all of which circumstances it was necessary should be proved before the plaintiff could obtain provisional sentence.

Provisional sentence refused (*vide* Buck v. Barker, p. 82).

1. GUARANTEE—WHEN ILLIQUID.

2. — OF PAYMENT OF OVERDUE BILL OF EXCHANGE.

1. EBDEN, HOUGHTON & CO. v. DE VILLIERS.

[28th February, 1828.]

A Letter from A. directing B. to furnish C. with Goods, in conjunction with a Bill drawn by C. on A., in favour of B., held Insufficient for Provisional Sentence against A.

Plaintiffs claimed provisional sentence for the price of goods alleged to have been furnished to defendant's brother, in respect of a letter from defendant to plaintiffs, directing

Ebden,
Houghton & Co.
v.
De Villiers.

Ebden,
Houghton & Co.
v.
De Villiers. plaintiffs to furnish merchandise to the brother; and of a bill drawn by the brother on the defendant in favour of the plaintiffs.

The Court held that those documents *per se* did not furnish such evidence of the plaintiffs' cause of action as to entitle them to provisional sentence; which was therefore refused.

2. McDONALD v. SUTHERLAND.

[28th February, 1833.]

Provisional Sentence refused against the Defendant, who, after Protest for Non-payment, had guaranteed the Payment of a Bill of Exchange to the Drawer.

McDonald
v.
Sutherland. This was a provisional claim, made by the plaintiff in virtue of the following documents, viz: 1st.,—

"London, 23d January, 1830.

"Six months after date, pay to my order £1071 11s., for value received in wine.

"A. McDONALD.

"To Mr. JAMES SUTHERLAND,
Fencourt, London.

"Accepted, payable at Messrs. Samson & Co.

"JAMES SUTHERLAND."

2dly. A protest for non-payment, in consequence of Messrs. Samson & Co.'s clerk answering "that they had orders to refer the said bill to the drawer;" having at the bottom of the page of the protest, in which the copy of the bill is written, the following words, written and signed by defendant:—

"I hereby guarantee the payment of the above amount to Mr. A. McDonald.

"THOS. SUTHERLAND."

Cloete, for the defendant, maintained that defendant could not be called on to pay until the acceptor of the bill was excused, or at least unless it was proved that payment of the bill had been demanded of, and refused by, the acceptor, subsequent to the time when he (the defendant) gave the guarantee.

Provisional sentence refused, with costs.

DOCUMENTS INSUFFICIENT PER SE. 75

1. PROMISSORY NOTE—PROOF OF PRESENTMENT AT A PARTICULAR PLACE.
2. ———— NOTICE OF DISHONOUR.
3. ———— ALLEGED TO BE “ACCEPTED.”
4. ———— ILLIQUID NATURE OF SIGNATURE AT THE BANK.
5. ———— ALLEGED TO BE “ACCEPTED.”
6. ———— PAYABLE AFTER NOTICE.
7. ———— NEGOTIATION—DAYS OF GRACE.
8. ———— ILLIQUIDITY.

1. MEIRING v. DE VILLIERS.

[1st February, 1834.]

Presentment and Non-payment of a Promissory Note are not Provable by Affidavit in a Provisional Case.

Claim for provisional sentence was made on the following note:—

Meiring
v.
De Villiers.

“Paarl, 9th December, 1832.

“Three months after date, I promise to pay Mr. J. Korsten, or order, the sum of Rds. 597, the payment to be made by Mr. J. G. Gie, at the Government Bank, in Cape Town.

“J. DE VILLIERS, A. SON.”

which had been indorsed by Korsten to the plaintiff.

The Court held that, before the plaintiff could recover judgment against defendant, he must prove presentment to, and non-payment by, Gie, and refused to receive an affidavit in proof thereof; and refused provisional sentence, with costs.

2. ANDERSON v. HUTTON AND WOEST.

[1st August, 1837.]

Notice of Dishonour of a Promissory Note is not Provable by Parole Evidence in a Provisional Case.

Provisional sentence was refused against the indorser of a promissory note, who did not admit that he had received due notice of its dishonour by the maker, there being no notarial protest against the maker; and the Court refused to receive an affidavit that notice of the dishonour had been duly given.

Anderson
v.
Hutton and
Woest.

[The Court had given a similar judgment on the 1st December, 1834, in the case of *Farmer v. Breda and Wolhuter*.] (*Vide De Ronde v. Zeiler, supra* p. 61, and *Trustees of Randall v. Haupt, p. 79.*)

3. BRINK v. MINNAAR.

[13th February, 1840.]

Provisional Sentence refused against the Defendant, who had written his Signature below the word "Accepted" across a Promissory Note, although the Maker of the Note had first been excused.

Brink
v.
Minnaar.

Provisional sentence was claimed by plaintiff's summons "upon and by virtue of a certain promissory note, made and signed by one J. B. R., to and in favour of the plaintiff, bearing date 1st June, 1839, and the payment of which said promissory note has been accepted by the said J. P. Minnaar" (the defendant).

The summons also narrated that the maker of the note had been excused, and that except to an amount of £4, the return of the Sheriff was *nulla bona*.

Across the face of the note was written—

"Accepted, J. P. MINNAAR."

which words were admitted to be the writing and signature of the defendant.

In November term, a claim for provisional sentence against the defendant had been refused, in consequence of his defence that his utmost liability could only be that of a surety, and that as he had not renounced the *beneficium excussionis*, he could not be sued until the principal debtor had been excused.

The plaintiff having excused the maker of the note, now claimed provisional sentence.

Musgrave, for defendant, maintained that, although the word "accepted," with the signature of the defendant immediately below it, may be held to infer some liability, or obligation, or other on him in plaintiff's favour, yet as he could not be the "acceptor" of a promissory note, in which the maker himself promised to pay, it could not be known, *ex facie* of the note, what was the nature and extent of his liability.

And as he alleged and produced an affidavit of the maker of the note to prove that it had been agreed between the plaintiff and him, that payment of the note was to be made by him, by executing certain work for the plaintiff, and that defendant should, by putting his name and "accepted" on the face of the note, only become surety that defendant would perform the work agreed on, and that the plaintiff had, by certain proceedings, prevented the maker of the note from performing that work,—there was not such evidence of the liquidity of the debt, as to warrant a provisional sentence.

Norton
v.
Satchwell. note, as having, by his signature on the back of the note, made himself liable as surety or *aval* (*vide* Van der Linden's Inst. b. 4: 7, § 5, p. 677).

But the Court held that the plaintiff must establish this in the principal action, and that such a liability did not necessarily follow from such a signature.

5. DE KOCK v. RUSSOUW AND VAN DER POEL.

[24th June, 1841.]

The word "Accepted," written across the face of a Promissory Note, with a Signature below it, creates no Liquid Liability.

De Kock
v.
Russouw and
Van der Poel. In this case, the Court held that the word "*accepted*" written across the face of a promissory note, made in the following terms:—

"On the 6th April, 1841, I promise to pay to Mr. A. M. Horak, or order, a sum of Rds. 1200, for value received in sheep.

"26th January, 1841.

"LAMBERT RUSSOUW.

"Accepted—J. N. RUSSOUW.

"H. A. VAN DER POEL."

with the signatures of J. N. Russouw and H. A. Van der Poel, written below the word "*accepted*," did not constitute such a liquid document of debt against them as was sufficient to warrant the Court to give provisional sentence; and refused provisional sentence, reserving it to the plaintiff to proceed with the principal case.

Costs to be costs in the cause.

6. VERSTER v. O'REILLY.

[28th February, 1843.]

Where a Promissory Note is made Payable in a Certain Time after Notice, such Notice cannot be proved by a mere Memorandum that it had been given, purporting to be written by a Notary Public on the Note.

Verster
v.
O'Reilly. Provisional sentence in this case was claimed on a promissory note, by a condition in which it was required that two months' notice should be given before payment could be demanded.

It was held by the Court that a memorandum written on the note that "Notice has been given, in writing, in terms of the condition.—1st August, 1842.

(Signed) "J. P. ROSELT, Notary Public."

was not a notarial act, and therefore was not sufficient to prove that notice had been given, unless it was supported by affidavit, to that effect.

Wherefore provisional sentence was refused.

Verster
v.
O'Reilly.

7. TRUSTEES OF RANDALL v. HAUPT.

[12th July, 1844.]

Affidavit held Incompetent to prove Indorser's Waiver of Due Negotiation.—Presentment on the Third Day after that on which the Note became due is not Due Negotiation in a Question with the Indorser.—There are no Days of Grace in this Colony.

The plaintiffs in this case claimed provisional sentence against the defendant on a promissory note made by one Mitchell in favour of the defendant, and by him indorsed to Randall; and produced the bill, which was dated 3d October, 1843, payable six months after date, *i.e.*, 3d April, 1844; they produced also a notarial protest for non-payment by Mitchell's trustees (he having become insolvent, and his estate having been placed under sequestration), when presented to them on the 6th of April, and of the due intimation of such dishonour to the defendant on the same day.

It was admitted that the 5th April was Good Friday.

The Attorney-General, for defendant, pleaded want of due negotiation, in respect that the bill had not been presented on the 3d.

Ebden, in answer, maintained that the insolvency of Mitchell, the maker of the note, relieved the holder from the necessity of presenting the bill to Mitchell or his trustees for payment when due. Secondly,—that presentment on the 6th April was due presentment. Thirdly,—that presentment had been made within the days of grace. Fourthly,—he tendered an affidavit to show that verbal intimation of the dishonour had been given to defendant *tempestive*, and that he had undertaken to pay the note.

The Court (Menzies, J., and Musgrave, J.,) refused to allow the affidavit to be produced, and *quoad ultra* ordered the case to stand over until the first provisional day in next term, in order that the bench might be full.

Trustees of
Randall
v.
Haupt.

Trustees of
Randall
v.
Haupt.

Postea, 1st August.—After hearing Ebdén, The Chief Justice stated that he concurred in the decision of the Court, refusing to allow the affidavit to be produced.

Ebdén then proceeded to argue in support of the 2d and 3d propositions maintained by him. On the 3rd point he quoted Heineccius on Bills of Exchange, chap. 2, § 15, note.

The Attorney-General, *contra*, quoted Chitty on Bills, p. 375, 9th ed.; Van der Linden's Inst., b. 4, c. 7, § 15, p. 690; Thomson on Bills, Appendix No. IX, p. 806; and maintained that if there were any days of grace in this colony, they must be the days of grace recognised by the laws of Amsterdam, being six days, in which case the presentment of the note would have been made too early, and therefore bad,—consequently, in that case, there would not have been such due negotiation as would render the indorser liable.

The Court held that there are no days of grace recognised in the law of this colony. And that presentment three days after the note became due, was not due presentment. And, consequently, that there was no evidence before the Court of any facts which would render the defendant, as an indorser, liable. They therefore refused provisional sentence, with costs.

8. NORDEN v. CAUVIN.

[29th May, 1845.]

A Promissory Note, payable "as soon as a Bill of Exchange referred to in it should be Discounted," is an Illiquid Document.

Norden
v.
Cauvin.

In this case the plaintiff claimed provisional sentence on the following document:—

"Walwich Bay, 27th February, 1845.

"I promise to pay Messrs. Morris, Dixon & Co., or order (at sight, or as soon as a bill of exchange which I hold on Messrs. Hamlin & Co., Greenock, can be discounted), the sum of £23 4s., as a balance over paid to me on said bill.

"J. CAUVIN,

"Master of the brig *Susan*."

which was admitted to have been signed by defendant, and specially indorsed by the payee to the plaintiff.

Ebdén, for the defendant, maintained that this was not such a liquid document of debt as to found a claim for provisional sentence, unless it were proved, *instanter*, by written evidence, that the bill therein referred to on Hamlin & Co.,

had been discounted; whereas, on the contrary, he now produced that bill, which the defendant had not been enabled to get discounted.

Norden
r.
Cauvin.

Cloete, for the plaintiff, stated that he had offered to discount the bill, provided the defendant produced to him the second and third bills of the set, alleging that the bill had been drawn in a set of three. Defendant denied this, and alleged that the bill was only drawn in a set of two, and offered to produce the second of the set.

The Court, without regard to the facts alleged, refused provisional sentence in respect of the illiquid nature of the document sued on.

1. REVIVAL OF SENTENCE—IN ITS TERMS NULL.
2. — — — AGAINST SURVIVING WIDOW.

1. THOMSON & Co. v. DE KOCK.

[3d June, 1834.]

Sentence of Revival refused on a Superannuated Provisional Sentence, which had been erroneously granted.

This was a provisional claim for the revival of a provisional sentence of the Supreme Court, dated 29th September, 1832, the extract of which produced was in the following terms:—
 “The Court granted provisional sentence for such sum and interest as the Master shall find to be due, on the examination of the accounts annexed to the bond and vouchers, subject to such deductions as the defendant shall be found entitled to.

"By the Court," **"T. H. BOWLES."**

Thereafter the Master made out the following certificate:

"December 1, 1832.

"I certify that I have examined the accounts herein referred to, between the parties, and in their presence respectively; and I find the sum of £3174 11s. 9d., with interest on £2174 11s. 9d. from the 26th September, 1832, on £300 from the 25th July, 1831, on £300 from the 25th August, 1831, and on £300 from the 25th September, 1831,—to be due from the above-named defendant to the above-named plaintiffs.

"CLERKE BURTON,

"CLERKE BURTON,

"Master of the Supreme Court."

On hearing the Attorney-General, for the plaintiffs, and Cloete, for the defendant, the Court held that the provisional

Thomson & Co. sentence of the 29th September, 1832, in the terms in which it had been drawn up, was one which it was not competent for the Court to have given, in respect that it did not refer to the Master any matter of fact or of account which it was competent to refer to the Master, to be by him ascertained, but delegated to him the entire jurisdiction of the Court in the case; consequently that this sentence, as drawn up, could not be given effect to, but must be held as null and as never having been given; and therefore they refused to revive the provisional sentence; but the Court revived the original provisional summons on which that sentence had been erroneously given, and postponed giving judgment thereon until the 4th June, when the Master's report on the state of the account should be received.

v.
De Kock.

NOTE.—On the 4th June the Attorney-General moved for provisional sentence, in respect of the bond granted by the defendant in favour of the plaintiffs, specified in the original summons, and dated 3d May, 1831.

Provisional sentence was given, as prayed, the mortgage being declared executable, with costs.

There could be little doubt that the finding of the Court of the 29th September, 1832, was loosely and improperly worded, and that nothing more had been intended than to refer to the Master to calculate the amount due to the plaintiffs after deduction of the sum admitted in the summons, and of the interest due on the balance, in terms of the bond.

2. BUCK v. BARKER.

[1st May, 1838.]

Provisional Sentence of Revival refused against a Surviving Widow and Heiress on a Superannuated Provisional Sentence against her Deceased Husband.

Buck
v.
Barker.

In this case, the Court found that the production of a provisional sentence against the deceased husband of the defendant, which had become superannuated, is not sufficient to entitle the plaintiff to obtain provisional sentence of revival against the defendant, although she be proved or admitted to be the surviving *widow and heiress* of the deceased, because the mere fact of her being *widow and heiress* afforded no *primâ facie* evidence that, as possessing this capacity, she was necessarily liable to pay this debt,—nor any ground for presuming that, if it had been paid, the voucher of payment should be in her possession, or under her control (*vide* Burton v. Vivier, p. 72).

CHAPTER III.

DEFENCE AGAINST PROVISIONAL CLAIM.

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1. BILL OF EXCHANGE—DEFENCE OF HOLDER'S SEQUESTRATION.
 2. ———— DEFENCE OF GAMBLING TRANSACTION.
 3. ———— DITTO.
 4. ———— DRAWN IN THE PARTNERSHIP NAME BY PARTNER AFTER DISSOLUTION.
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1. BARRY v. BAILEY.

[2d June, 1834.]

Defence against a Provisional Claim on a Bill of Exchange that the Holder, who was the Payee, had after the Drawing of the Bill been sequestrated as Insolvent,—and that no Assignment to him had been made after the Sequestration.

This was a claim for provisional sentence on the following document:—

Barry
v.
Bailey.

“Wynberg, 30th September, 1822.

“Six months after date, pay to the order of Mr. Joseph Barry the sum of £67 1s. 6d., for value received.

“C. A. WENTWORTH.

“To SAMUEL BAILEY, Esq.,

“Long-street, Cape Town.”

Across the bill was written—

“Accepted, SAMUEL BAILEY.”

The Attorney-General, for Bailey, objected to the title of the plaintiff to claim provisional sentence, in respect that the plaintiff had been, in 1827, sequestrated as insolvent, and although rehabilitated in 1829, he had set forth no assignation of this debt from the creditors, who had claimed under the sequestration.

The plaintiff admitted the fact of his having been sequestrated.

Provisional sentence refused, with costs.

2. FRESHFIELD *v.* HARRIES.

[30th June, 1830.]

How far the Allegation of Nullity of the Debt, as arising from a Gambling Transaction, is a Defence to Provision where the Instrument of Debt (being a Bill of Exchange or Order) expresses no "causa debiti."—Affidavits held Inadmissible to support or rebut such Defence.

Freshfield
v.
Harries.

In this case, the plaintiff claimed provisional sentence on the following document:—

"No. 5.

"Mansion-house-street, London.

"Messrs. Sikes, Smith & Co., pay to Mr. Freshfield, or order, sixty pounds.

"£60.

"W. M. HARRIES."

The defence maintained by the defendant was, that the cheque had been given to settle a gambling transaction on the stock exchange, and was therefore in England, where it had been granted, null and void, in virtue of the provisions of the statute of 7 George II, c. 8, and on which therefore an action could not be sustained.

To this defence it was answered that no proof had been produced to support it. But it was replied that the document sued on did not express any *causa debiti*, and, therefore, unless the plaintiff could satisfy the Court from circumstances that it must be presumed that there was a lawful *causa debiti*, he was not, by virtue of it, entitled to provisional judgment. Voet 42: 1, § 15; Van der Linden, Judicial Practice, b. 2, c. 6, § 13; Van Leeuwen, Manier van Procederen, § 10, note, p. 39; Reitz's Heinneccius on Bills of Exchange, p. 354.

Both parties offered to produce their own affidavits, the defendant that the cheque was granted in satisfaction of a gambling transaction on the stock exchange, the circumstances of which it detailed; and the plaintiff that the defendant was justly and truly indebted to him for money lent and advanced.

The Court refused to allow either of the affidavits to be produced.

Menzies, J., and Burton, J., were of opinion that the defendant having taken the exception that the document sued on did not express the *causa debiti*, and the plaintiff having failed even to allege circumstances from which a lawful *causa debiti* could be presumed, no provisional sentence could be given.

[N.B.—The plaintiff's counsel did not make any statement beyond what was contained in the affidavit, which, so far

from alleging any lawful *causa debiti*, did not even expressly negative the averments of the defendant.]

Freshfield
v.
Harries.

The Chief Justice and Kekewich, J., held that provisional sentence should be given.

Kekewich, J., while he concurred in the principles on which the opinion of Menzies, J., and Burton, J., was founded, thought that there had been a train of decisions given by the Court which had established a rule that provisional sentence must be granted in cases similar to the present.

No decisions were specified.

The Court being equally divided, no judgment was given on the provisional claim (*vide* Rens v. Horak, p. 40; Muller v. Redelinghuys and Van Reenen, p. 41; Low v. Oberholzer, p. 43).

3. KENNEL v. HARRIES.

[30th June, 1830.]

Whether a Defendant is entitled to refer to the Plaintiff's Oath to prove the Nullity of the Debt as being a Gambling Transaction, as a Defence against a Provisional Claim on a Bill of Exchange.—When Affidavits are admissible to prove Incidental Circumstances.

Plaintiff claimed provisional sentence upon a bill of exchange, dated 1st May, 1825, of which the following is a copy:—

Kennel
v.
Harries.

“£300.

“Four months after date, pay to my order the sum of three hundred pounds, for value received.

“F. FRESHFIELD.

“Accepted, payable at Messrs. Sikes, Smith & Co.

“W. M. HARRIES.

(Indorsed) “F. FRESHFIELD.”

The defence set up was, that this bill was granted in satisfaction of the same illegal transaction as in the last case; that the plaintiff was not an onerous indorsee, and that he knew at the time he took the bill, that it was granted for an illegal consideration, and the defendant offered to prove his defence by reference to the decisory oath of the plaintiff; and stated certain circumstances, some of which appeared *ex facie* of the case, and others, to which he offered to make affidavit to satisfy the Court, that this offer was made *bonâ fide*, and not for the purpose of obtaining delay,—and quoted Van Leeuwen, Manier van Procedeeren, § 10, note, p. 39.

Kennel
v.
Harries.

The plaintiff maintained that the defendant was not entitled to make the reference to the oath of the plaintiff, and that his defence not having been verified *instantly* by proof, it must be repelled, and provisional judgment pronounced.

Menzies, J., and Burton, J., held that the defence pleaded was a relevant and sufficient defence against the claim, provided it were proved. 2dly, that it was competent for a defendant in order to elide a provisional claim, to refer any relevant and sufficient defence *peremptorie* to the decisory oath of the plaintiff, and that the Court were bound to allow such reference, except when it appears to be made for the purpose of delaying the case. 3dly, that the circumstances appearing, and those alleged by the defendant which he offered to verify by affidavit (a mode of proof which they held to be competent to prove such facts for such purpose), were sufficient to satisfy them that the reference to oath was not made for the purpose of delay, and therefore that the Court were bound to allow the proposed reference.

The Chief Justice and Kekewich, J., held that it was not competent for the defendant to offer to prove his defence by reference to the oath of the plaintiff, and that not having instantly proved his defence, provisional judgment ought to go against him.

The Court being equally divided in opinion, no judgment was given on the provisional claim.

4. DAVIS & SON v. McDONALD & SUTHERLAND.

[4th June, 1833.]

Defence to a Provisional Claim against two late Partners on a Bill, purporting to be drawn by the Partnership, that it had been drawn by one Partner only after Dissolution.

Davis & Son
v.
McDonald &
Sutherland.

On the 1st instant the plaintiffs claimed provisional sentence against both defendants,—the one paying the other to be absolved,—as heretofore trading in co-partnership under the style or firm of McDonald & Sutherland, for £450, which (it was alleged in the summons) “they owed in manner aforesaid to the plaintiffs, upon and by virtue of the following bill of exchange :—

“ Cape Town, Cape of Good Hope,
“ 28th February, 1832.

“ Exchange for £450.

“ Thirty days after sight, this first of exchange (second and

third not paid), pay to the order of Messrs. James Davis & Son, the sum of £450, for value received, which place to account of Mr. Alexander McDonald.

Davis & Son
v.
McDonald &
Sutherland.

(Signed) "McDONALD & SUTHERLAND.

"To Mr. SAMUEL DIXON,
"Mark Lane, London."

which said bill had been protested for non-payment."

The defendants were also summoned to acknowledge or deny their signature, or that of their said firm, affixed to the said bill of exchange, or the validity of the debt.

Cloete appeared for the plaintiffs.

The Attorney-General for the defendant McDonald.

No appearance was made for Sutherland.

The defendant McDonald denied the signature of the bill as being binding on him, and the validity of the debt. Whereupon, by consent, the case was postponed until the 4th June, when the plaintiffs were allowed to call

William Wilkinson, clerk to the defendant McDonald, who produced the articles of co-partnership between McDonald and Sutherland, which was to commence on the 1st March, 1827, and to end 29th February, 1833, and proved that the signature of McDonald & Sutherland, on the bill sued on, was the signature of the firm, in the handwriting of Sutherland.

On his cross-examination, he produced the following copy of an advertisement, admitted to have been inserted by Sutherland in the *South African Commercial Advertiser* of the 5th January, 1831:—

"NOTICE.—The partnership concern under the firm of McDonald & Sutherland is dissolved and terminated this day, in respect to all further transactions in trade. All claims and outstanding matters will be settled by them under the said signature, and those indebted are requested to pay the amount forthwith.

(Signed) "McDONALD & SUTHERLAND.

"Cape Town, 31st December, 1830."

On his re-examination, the witness stated that, after this notice, the firm of McDonald & Sutherland had no transactions of any kind, except winding up the concerns of the firm; that he knew that the plaintiffs were creditors of the firm for more than the amount drawn for in the said bill; and that in January and February, 1832, bills came here from Van Diemen's Land, in favour of McDonald & Sutherland, of which McDonald took possession.

The witness also produced the following letters, the first in

Davis & Son the handwriting of, and signed by, Sutherland, with the signature of the firm, addressed to McDonald, and the latter signed by McDonald :—
 v.
 McDonald & Sutherland.

“Cape Town, 28th February, 1832.

“Sir,—In consequence of your retaining the remittance in treasury bills, amounting to £750, received on our account from Messrs. Kemp & Co., Hobart Town, and refusing the same to be applied to the debts of the concern in London, we beg to apprise you of our having this day valued on your agent, Mr. Dan. Dixon, in favour of the undermentioned parties, to whom we were indebted, viz,—

Messrs. James Davis & Son. 30 days	£450
Capt. Robt. Knox.....	250

£700

“And we have to request you will give instructions for the said drafts to be duly honoured from the funds of the concern in his possession.

“We are, &c.,

(Signed) “McDONALD & SUTHERLAND.

“To Mr. ALEX. McDONALD, Cape Town.”

“Cape Town, 29th February, 1832.

“Sir,—In reply to your letter of yesterday’s date, I have to acquaint you that my agent will not pay any bill drawn by you in the name of McDonald & Sutherland, destined to the part discharge of the debt due by the firm.

“He has no funds in his hands belonging to the concern. What he may receive from shipments made by the concern will be received under your own directions in part liquidation of the heavy balance due by the concern.

“I am, however, desirous that Messrs. James Davis & Son and Mr. Robert Knox should be paid what is due to them, and will write my agent to pay the amount due to them as soon as he shall have received payment of Mr. James Sutherland’s acceptance, in my favour, dated London, 23d January, 1830, and a bill drawn in my favour by Sutherland Brothers, and accepted by James & Thomas Sutherland, for £864 7s. 6d., and interest from the 4th January, 1831, and will provisionally debit the firm with the payment of the debt due to Messrs. Davis & Son and Capt. Knox.

“I am, your obedient servant,

“A. McDONALD.

“Mr. THOMAS SUTHERLAND, &c.”

The Court refused provisional sentence as against McDonald, with costs, whereupon Cloete, for plaintiff, withdrew the case against both defendants. (*Vide* Van der Keessel 854, 856, 857, 861; Van der Linden, b. 4, c. 7, § 11, p. 686.)

1. BOND—PAROLE EVIDENCE OF “NON NUMERATÆ PECUNIÆ.”
2. — PAROLE EVIDENCE OF “PACTUM DE NON PETENDO.”

1. BERGH, N. O., *v.* KRIGE AND BOSMAN.

[10th February, 1835.]

Parole Evidence of the Defence “non numeratæ pecuniæ” allowed to a Provisional Claim on a Bond.

In this case, the defendant alleged, in defence against a provisional claim on a notarial bond, that the money mentioned in the bond had never been paid by the creditor to the debtor, but that the bond, after having been executed by the defendant, and placed in the hands of his agent for the purpose of receiving the money and giving the bond to the creditor, had been left by the agent with the creditor, on a promise that he would send the money to the agent, and that he never did so, although the agent, after the lapse of some weeks, made a second application, and received a second promise that the money should be sent to him, and offered *instante* to prove this allegation by parole evidence, which the Court allowed.

Bergh, N. O.,
v.
Krige and
Bosman.

Defendant called C. Mocke, who completely proved the allegation. Provisional sentence refused. Costs of the day to be costs in the cause.

2. ROUX *v.* EXECUTORS OF ROOS.

[31st August, 1847.]

The Defence of “Pactum de non petendo” may be referred “instante” to the Plaintiff’s Oath.

This was a claim for provisional sentence by a surety against his co-surety for payment of one-half the amount of the bond for which they were co-sureties, the whole amount of which had been paid, and the bond itself ceded, by the creditor to the plaintiff. This bond contained a clause by which the co-sureties bound themselves to relieve each other.

Roux
v.
Executors of
Roos.

The Attorney-General, for the defendant, opposed the *exceptio pacti de non petendo*, and offered to prove the same *instante* by reference to the oath of the plaintiff.

Roux
v.
Executors of
Roos.

This reference the Court (Chief Justice absent) on the authority of Voet 42: 1, §§ 9 and 10, and Van Leeuwen, Cens. For. 1: 4, 18, § 4,—held to be competent, and removed the case to the Circuit Court of Stellenbosch, to take the oath of the plaintiff, and after he had given or refused to give said oath, to dispose of the cause according to law.

N.B.—The Circuit Court at Stellenbosch took the plaintiff's oath, which completely negatived the existence of a *pactum de non petendo*, and gave judgment for plaintiff, as prayed, with costs.

1. CONDITIONS OF SALE—DEFENCE OF COMPENSATION.

1. EATON, N. O., v. JOHNSTONE.

[4th June, 1833.]

Defence against a Provisional Claim for the first Instalment of Landed Property purchased at Public Auction, that the Defendant held a Mortgage Bond over the Property, the amount of which he offered to allow, in diminution of the Sum claimed.

Eaton, N. O.,
v.
Johnstone.

Provisional sentence was prayed for £200, being the first instalment of the price of immoveable property, part of the insolvent Brown's estate, purchased by defendant, under the following conditions:—

"1st. The property to be sold, the price payable in three instalments, the first payable in cash at the time of sale.

"5th. Upon payment of the first instalment of the purchase money, and giving security for the payment of the remainder thereof, in manner hereinbefore mentioned, the transfer of the said property shall be effected according to the law and usage of this colony."

The defendant, in defence, pleaded that he held a mortgage bond over the property for £300, on which a balance was due of £170 or £180; and that he was entitled to refuse payment of the first instalment, until, by the discharge of this mortgage, the plaintiff could give him transfer of the property unincumbered,—for which purpose he offered to settle with the plaintiff the actual amount of the balance still due on the mortgage bond, and thereafter instantly to pay the difference between that balance and the amount of the first instalment now sued for.

The Court held that this was a good defence against the provisional claim, and refused provisional sentence, with costs.

1. JUDGMENT—AGAINST PARTNERS OF A LATE FIRM PAID
BY ONE PARTNER.
2. — OF INFERIOR COURT, IMPROPERLY GIVEN.

1. McDONALD *v.* SUTHERLAND.

[3d June, 1834.]

A Judgment against two late Co-Partners, paid by one of them, gives no Provisional Claim in favour of that one against the other for any amount, the Partnership Accounts being yet unsettled.

This was a claim for provisional sentence by McDonald against Sutherland, founded on a sentence condemning both parties as late co-partners (trading under the style or firm of McDonald & Sutherland), jointly and severally, to pay to Silberbauer, qq. Davis, £539 6s. 3d., being the admitted balance due to the said plaintiff by the late firm of McDonald & Sutherland, with interest and costs of suit,—and a receipt from the said Silberbauer, acknowledging having received the whole amount from McDonald.

McDonald
v.
Sutherland.

Cloete, for the defendant, averred, what was admitted by the plaintiff, that the partnership accounts of the late firm had not been as yet settled between the parties, but were at present before the Master for adjustment.

The Court unanimously refused provisional sentence, with costs.

2. THORLEY *v.* DE LIMA.

[13th February, 1840.]

Provisional Sentence refused on a Sentence of an Inferior Court, which was found by the Court to be of such a nature that it would be set aside on Review.

Plaintiff claimed provisional sentence in virtue of a sentence of the Resident Magistrate of Cape Town, which he had obtained against the defendant.

Thorley
v.
De Lima.

Cloete produced an affidavit, by defendant, to the following effect: “that a summons having been issued against him, in the Court of the Resident Magistrate of Cape Town, at the suit of J. Thorby, he had appeared and objected to said summons, and denied the debt, stating that he was not

Thorley
v.
De Lima.

indebted to the said J. Thorby; whereupon the Magistrate, notwithstanding defendant objected thereto, amended the said summons by styling the said J. Thorby Jabez Thorley, and granted judgment against him in favour of said Thorley." He produced the copy of this summons served on the defendant, in which the plaintiff's name was plainly written Thorby; and maintained that, as the Magistrate had no power to make such an alteration without defendant's consent, the sentence was illegal, and would be set aside, on review, by the Supreme Court; and, therefore, could not be the ground of a provisional sentence. The plaintiff did not deny the truth of the statement made as to the proceedings in the Resident Magistrate's Court.

The Court held that the names of Thorby and Thorley were different names, and that the Resident Magistrate could not substitute the latter for the former without the defendant's consent, and could not give judgment in favour of Thorley, on a summons at the instance of Thorby; that this sentence would therefore, on review, be set aside, and consequently that it could not be the ground for a provisional sentence.

Provisional sentence refused, with costs (*vide* Greig v. De Lima, *supra*, p. 29).

1. LEASE—DEFENCE OF MINORITY.

1. GANTZ v. WAGENAAR.

[30th December, 1828.]

Minority held a sufficient Defence against a Provisional Claim.

Gantz
v.
Wagenaar.

The plaintiff claimed provisional sentence for £33, being the rent of a house which the defendant, a minor, aged 22 years (25 years being at that time the age of legal majority), had hired by a notarial agreement, in which he was assisted by his mother, therein stated to be, but who was not, his legal guardian.

The Court held that the mother's consent did not supply the want of that of the legal guardian, and (with the exception of Menzies, J.) held that the defence of minority was sufficient to bar provisional sentence.

Menzies, J., held that, as the defendant did not even allege lesion of the minor by the transaction, the defence of minority ought to be repelled, and provisional sentence given. (Voet 4: 4, 13, and 42: 1, 9.)

The Chief Justice and Kekewich, J., doubted whether the liquidity of the claim for rent was sufficiently established by the mere production of the deed constituting the lease.

Gantz
v.
Wagenaar.

Menzies, J., and Burton, J., held that it was (*vide* Neethling v. Taylor, &c., pp. 30–34).

The case was decided solely in respect of the defence of minority.

1. LIQUID DOCUMENT—DENIAL OF SIGNATURE.
2. ——— DEFENCE OF ANTIQUITY.

1. STILL v. DE WET.

[18th February, 1834.]

Provisional Sentence refused, the Verity of the Signature to the Document sued on having been rendered doubtful by Parole Evidence.

A doubt having been raised as to the competency of hearing conflicting parole evidence as to verity of a signature, and deciding on it, on the provisional claim in this case, the Court held that it was competent to hear parole evidence, and to pursue it, until a doubt was raised as to the verity of the signature, when proceedings on the provision must be stayed, and the trial of the verity of the signature postponed until the trial of the principal case.

Still
v.
De Wet.

Two witnesses were then examined, whose evidence made the verity of the defendant's signature very doubtful, and provisional sentence was refused, with costs (*vide* Dieterman v. Curlewis, p. 42; Deneys v. Daniel, p. 44; and Norden's Trustee v. Butler, p. 52).

2. KOEMANS v. VAN DER WATT.

[7th August, 1838.]

When Antiquity, coupled with other circumstances, amounts to a Defence against a Claim on a Liquid Document.

The plaintiff claimed provisional sentence on the following document:—

"I, the undersigned, do hereby acknowledge to be indebted to Mr. N. Koemans, or order, a sum of Rds. 800, for value

Koemans
v.
Van der Watt.

Koemans received,—of which I, the undersigned, promise to pay,
 v. monthly, Rds. 100, in good and useful wagonwood and
 Van der Watt. stinkwood, at the bay's price, to be delivered at the Knysna,
 to his agent there.

“ J. S. VAN DER WATT.

“ 30th November, 1829.”

The Court, without giving judgment on any of the other legal questions raised by the parties, refused provisional sentence, on the ground that the antiquity of the document of debt, coupled with the admitted fact that it had been assigned by the defendant, and for some time had been out of his possession, rendered the truth and validity of the defence, set up by the defendant, very probable (*vide supra*, p. 36).

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| 1. | PROMISSORY NOTE—ALTERATION OF DATE. |
| 2. | — — — — — “NOVATIO DEBITI.” |
| 3. | — — — — — SEQUESTRATION OF PAYEE. |
| 4. | — — — — — INDORSEE. |
| 5. | — — — — — PAYMENT.—USURY. |
| 6. | — — — — — NOMINAL HOLDER. |
| 7. | — — — — — “BONA FIDE” INDORSEE. |
| 8. | — — — — — INDORSEE.—AGREEMENT TO GIVE
TIME BY PAYEE. |
| 9. | — — — — — AGREEMENT TO GIVE TIME. |
| 10. | — — — — — DITTO. |
| 11. | — — — — — DITTO. |
| 12. | — — — — — INDORSEMENT AFTER NOTE DUE. |
| 13. | — — — — — DISCOUNT OR SALE OF BUTCHER'S
NOTE. |
| 14. | — — — — — NOMINAL HOLDER.—AGREEMENT WITH
PAYEE. |
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1. MULLER v. LANGEVELD.

[20th August, 1833.]

Defence that the Date of the Promissory Note sued on had been Altered.—“ Perpetuum Silentium.”

Muller In this case, which was a provisional claim by an indorsee
 v. on a promissory note, the defendant averred that the date of
 Langeveld. the note had been altered without the defendant's knowledge,

from December, 1833, to 1832, after it had come into the possession of the indorsee (the plaintiff); and offered to instruct this fact instantly by parole evidence.

Muller
v.
Langeveld.

Menzies, J., and Kekewich, J., held that it was competent to receive this evidence.

The Chief Justice was of opinion that the parole evidence should not be received to stop a provisional sentence.

The defendant was allowed to prove his averment, and called

Dirk Aspeling, notary, who deponed that this note, in June last, was put into his hands by Muller, the plaintiff, to demand payment; that he did so, and that the defendant called his attention to the date, and that at that time it had the last figure 3 in 1833 distinctly visible; and also, super-induced on that figure, the angle in the darker ink, and somewhat resembling a second figure. That he returned the note to the plaintiff, and pointed out the date to him, and he said it was 1832, but witness said to him that it appeared to him to be 1833.

The lower part of the said figure 3 has since been erased.

Provisional sentence refused, with costs.

Postea (28th February, 1834).—The plaintiff having previously given notice that he had withdrawn this action, Cloete, for the defendant, moved for a citation calling on plaintiff to bring a new action within six weeks, or in default to do this, to be barred therefrom, and perpetual silence imposed on him. (*Vide* Van der Linden, b. 3, pt. I, c. 3, § 5, p. 425.)

The Court refused the motion, with costs.

Postea (2d June, 1834).—Provisional sentence was again prayed and refused, with costs, in respect of the same note, on a summons which stated that the note bore date the 22d December, 1832 or 1833.

2. CANNON v. FORD.

[2d June, 1834.]

Defence of "Novatio Debiti" against a Provisional Claim on a Promissory Note.

In defence against the claim for provisional sentence on a promissory note by defendant in favour of plaintiff, payable three months after date, and dated 1st November, 1833.

Cannon
v.
Ford.

Cannon
v.
Ford.

Brand, for the defendant, produced an engagement under the hand of the plaintiff, to the following effect:—

“Mr. James Ford bought from me the value of Rds. 700 in furniture, and being now, from the loss of the money he expected to receive, unable to pay for it, I engage to wait till his claim is decided by the Orphan Masters, and if against him, to receive back the furniture, being paid for the price of it.

“W. E. H. CANNON.

“1st February, 1834.”

The Court held that this document had the effect of a *novatio debiti*, and that, under the conditions of the said engagement, the plaintiff was not entitled to demand provisional sentence at present.

Provisional sentence refused, with costs.

3. SMITH v. CAMPBELL.

[1st August, 1839.]

*Defence against a Claim on a Promissory Note that the Payee, who had Indorsed the Note, was a Non-rehabilitated Insolvent, who could therefore give no Valid Title to the Plaintiff.**

Smith
v.
Campbell.

This was a claim for provisional sentence on a promissory note, dated 1st January, 1839, made by the defendant to the order of Mr. Joseph Osmond, indorsed in blank, J. Osmond—G. Mills.

Musgrave, for the defendant, objected that Osmond's estate had been placed under sequestration in 1837, and that it had not been released, nor Osmond rehabilitated; consequently, the plaintiff had acquired no valid title to the note by Osmond's indorsation.

Cloete, for the plaintiff, replied that this was not such an objection as could be maintained against provisional sentence, when the defendant admitted his signature and the validity of the debt.

But the Court thought otherwise; and refused provisional sentence, with costs.

* This was by the provisions of Ordinance No. 64.—By the Ordinance No. 6, 1843, section 126, such indorsation would be good, if made after the confirmation of the account and plan of distribution.—[Ed.]

4. HOVIL & MATHEW v. WOOD.

[6th February, 1840.]

Circumstances entitling the Maker of a Promissory Note to the same Defences against Indorsees as against the Payee, in a Provisional Claim.

In this case, the plaintiffs in the summons claimed provisional sentence "upon and by virtue of a certain promissory note, bearing date the 3d October, 1839, signed by the said Z. N. Wood (the defendant), in favour of William Gilmer, or order, and by him indorsed in blank;" and produced the note which bore to have been given for value received, and had been blank indorsed by Wm. Gilmer, below whose indorsation the following words had been written, and afterwards scored through, but yet leaving the whole legible:—

Hovil &
Mathew
v.
Wood.

"Received payment
from Messrs Hovill & Mathew,
31/1/40. Per John Reid,
Plaintiffs' Attorney, S. J. RORICH."

There were also on the back of the note the following words and figures written above Gilmer's name:—

"Debt.....	£110	0	0
"Interest	0	10	5
"Costs	4	6	7
	<hr/>		
	"£114 17 0."		

The note was also stamped on its face as below:—

CAPE OF GOOD
HOPE BANK.

Cloete, for the defendant, alleged that the note was granted by the defendant to Gilmer, with whom he had been engaged in a joint concern, for the accommodation of the latter; and that, therefore, although it bore to have been for value received, Gilmer would not have been entitled to claim provisional sentence on it, because a dispute had arisen between them as to the state of their accounts, on which, according to a statement thereof, made out by an accountant by order of Wood (in verification of which statement he offered the affidavit of the accountant), and in which this note was taken into account, there was a balance of £700 in favour of the defendant, and because in consequence of the said dispute, the defendant and Gilmer had, before this note became due,

Hovil &
Mathew
v.
Wood.

submitted all matters of account in dispute between them (including this note) to arbitration, on which submission the arbitrators had as yet made no award; * and that the plaintiffs could be in no better situation than Gilmer, and were liable to every objection to which Gilmer would have been liable, because they had given no valuable consideration for the note to Gilmer, but had obtained it long after it was due, from the Cape of Good Hope Bank, who had held it in virtue of Gilmer's blank indorsation; and that plaintiffs had done this in collusion with Gilmer, in order to prevent the defendant from availing himself of his defence against any claim made on the note by Gilmer, and that before the plaintiffs had so obtained it, the bank had taken out a summons against Gilmer for payment of it.

Musgrave, for the plaintiffs, *contra*, while he admitted that the plaintiffs had paid no consideration for the note to, and had not received it from, Gilmer, but from the attorney of the bank, to whom, as was proved by the receipt on the note, they had paid the full amount of the note, maintained, that, as they had given full value for the note to the bank, they were placed in the same situation, and had the same right to recover payment of it from the defendant that the bank had, although they had not acquired right to it from the bank till after it was due; and he maintained that as the bank had given full value for it to Gilmer, *bonâ fide* and without any privity with Gilmer, the bank would have been entitled to obtain provisional sentence against the defendant; consequently that the plaintiffs being in the same situation, and having an equally unexceptionable title as the bank, were entitled to a provisional sentence.

JUDGMENT:—The Court were of opinion that the plaintiffs must be held by the form of the summons to claim only as the immediate indorsees of Gilmer, and that as the submission to arbitration would have prevented Gilmer from recovering provisional sentence on the note, pending the submission, the plaintiffs were not entitled to claim provisional sentence against the defendant, 1st, because it was admitted that the plaintiffs had given no consideration for it whatever to Gilmer; and 2dly, because even if they had given him full value for it, they had not done so until long after the note was due, either of which circumstances was sufficient to deprive them of the privileges of indorsees, and to make them liable to every defence which the defendant would have had against Gilmer, if he had been the plaintiff in this action; 3dly, that even if they were entitled, notwithstanding the form of the summons, to claim payment in any other

* The facts as to the arbitration were admitted by the plaintiffs.

character than as the immediate indorsees of Gilmer, the plaintiffs had adduced no evidence either *ex facie* of the note, or otherwise, to prove the liquidity of their debt as against the defendant. The words stamped on the face

Hovil &
Mathew
v.
Wood.

of the note were not Cape of Good
Hope Bank. evidence that the bank

had ever been holders of it, and there was no evidence *ex facie* of the note, that any other person had been holder of the bill between Gilmer and the plaintiffs, and consequently no evidence that the plaintiffs had paid value for it to, and received it from, any person entitled to the privileges of a *bonâ fide* onerous indorsee, or, indeed, from any person except Gilmer;—that *ex facie* of the note, there was no evidence to prove under what circumstances, or to whom, the plaintiffs, admitting that they had paid the amount of the note to some one, had really paid it. From all that appeared from the note, or from any evidence which could be admitted in a provisional case, *non constat*, that the plaintiffs had not paid it to some indorsee or holder “*for the honour of Gilmer the payee and indorser*,” in which case they could be in no better situation than Gilmer himself; or that they were not the confederates of Gilmer, and had paid it to enable him thus to obtain the payment of it from the defendant, which he could not have done if he had sued in his own name;—nay, it was possible that they might have obtained it as the agents of the defendant, in consequence of having paid it to Gilmer, with funds furnished to them by the defendant:—in short, that there was no way of ascertaining the true state of the transaction, except by the production of evidence not admissible in a provisional case. On these grounds the Court refused provisional sentence. Costs to be costs in the cause.

5. SUTHERLAND v. ELLIOTT BROTHERS.

[12th July, 1841.]

Defence against a Claim by the Payee of a Promissory Note that other Securities had been given in Payment by the Maker and accepted by the Payee.—Whether Usury is a good Defence.

Ebden, for the plaintiff, claimed provisional sentence against defendants for £183, being the amount of a promissory note made by the defendants in favour of the plaintiff, and which became due on the 3d July, 1841.

The Attorney-General, for the defendants, produced three documents signed by the plaintiff, by which it was proved,

Sutherland
v.
Elliott Bros.

Sutherland
v.
Elliott Bros.

that,—when the plaintiff made the advances, or gave value for the note in question, and other notes made by the defendants in favour of the plaintiff, not yet due, or for the renewal of which other similar notes, not yet due, had been given by the defendants to the plaintiff,—the defendants, in order to give the plaintiff security for his advances, had, by notarial cessions, ceded to the plaintiff in such a manner as to entitle him to demand and sue for payment of them in his own name, certain bonds in favour of the defendants, not only the gross amount of which, but the amount at which the plaintiff had, in one of the three documents produced, valued them, exceeded the amount of the promissory notes given by the defendants to the plaintiff. That the principal debtor (Filmalter) in two of those bonds had become insolvent, and his estate had been placed under sequestration. That the plaintiff had claimed in the insolvent estate, in his own name, for the amount of these bonds, and that he had thereafter received from the surety in those two bonds (Mr. J. Maynard) two promissory notes for their amount, which notes would become due in a few weeks; and that he had granted to the surety a receipt, in which he acknowledged having received these notes, and bound himself, on the notes being paid, to cede to him the two bonds.

The Attorney-General maintained that the insolvency of the principal debtor (Filmalter) rendered both him and his surety (Maynard) instantly liable to pay the two bonds. That the nature of the cession of these bonds by defendants to plaintiff, made it imperative on the plaintiff, on the insolvency of the principal debtor, Mr. Filmalter, to demand payment of them immediately, both from the estate of the debtor and from his solvent surety, Mr. Maynard. That, as the plaintiff had chosen to take notes instead of cash from the surety, the taking of these notes by him must, in a question with the defendants, be held (at least until the notes should become due and be dishonoured) as equivalent to payment of the bonds made to him in cash by the surety; and that although, had the plaintiff received no part of the proceeds of the bonds, he might have been entitled to retain them all as security until the whole of plaintiff's notes to him should have been paid,—or could, at most, only be liable in equity to return them to defendants to such an amount only as exceeded what was adequate security for the balance remaining due to him by the defendants on their outstanding notes,—yet, as soon as he received payment in cash (or in what must be held equivalent to cash) of these bonds, he was bound to, and the defendants were entitled to insist that he should, apply the amount of those payments in discharge of the notes due by them to him as they became payable; consequently that Mr. Sutherland was not now entitled to demand payment from

Elliott Brothers of the note sued on, which he must be held to have already received payment of, out of the amount he had received from Mr. Maynard, as surety in the two bonds.

Sutherland
v.
Elliott Bros.

The Court unanimously held that the defence maintained by the defendants was sufficient to bar the plaintiff's claim for provisional sentence, which was refused with costs.

The defendants also proved, by the three documents above mentioned, produced by them, that the plaintiff had, when he discounted the note sued on, and the other notes held by him, invariably charged 12 per cent. as commission and discount on each of the notes, as well those originally granted by them for value received as those granted by them in renewal of the originals; while in those cases in which the value given by him to the defendants, consisted of his own bills or notes, he had allowed them only 6 per cent. as discount,—and maintained that, on this account, the bill sued on must be considered as a usurious transaction, or that, at least, the defendants were entitled to deduct from it some amount, greater or less, on account of this usurious interest, which had been exacted from them both in respect of it and in the course of the transactions between them, of which it was an integral part; and that on this ground they were entitled to oppose plaintiff's claim for provisional sentence.

Menzies, J., stated his opinion that the Dutch law against usury—which had been introduced in the colony at the same time with, and was as much law as the law against murder—was such that he would have sustained, on this ground alone, the defendants' objection to plaintiff's claim for provisional sentence. The rest of the Court expressed no decided opinion on this point.

6. TAYLOR v. ELLIOTT BROTHERS.

[2d August, 1841.]

An Indorsee without Value liable to the same Defences as his Indorser.

Cloete moved for provisional sentence on two promissory notes, the first for £190 16s. 6d., and the second for £155 11s. 6d., both drawn by Messrs. Elliott Brothers in favour of Mr. Thomas Sutherland, and by him indorsed in blank.

Taylor
v.
Elliott Bros.

The Attorney-General opposed the claim, and produced the following affidavit by the defendant, Mr. John Wilkinson Elliott:—"That he has been credibly informed, and verily believes, that certain two promissory notes (describing the two notes sued on) have been placed in the hands of plaintiff, Robert Taylor, by the said Thomas Sutherland, solely for

Taylor
v.
Elliott Bros.

the purpose of enabling the said Thomas Sutherland the more readily to obtain payment thereof, and to avoid the legal exceptions of usury and payment which the said Thomas Sutherland knows could be successfully pleaded by the said firm of Elliott Brothers, against himself. And that the said two notes have been so placed in the hands of plaintiff or have been so delivered or passed away by the said Thomas Sutherland to the plaintiff, without value or consideration given by the latter therefor, since the hearing of a certain provisional case (describing the case of Sutherland v. Elliott Brothers, *supra*), wherein provisional sentence was refused on the 12th of July last; and that the said deponent verily believes that the plaintiff, at the time when such notes were placed in his hands, and when he took out the summons in this case, was well aware of the facts and circumstances above stated, and acts in concert with the said T. Sutherland, and in the said T. Sutherland's behalf in this matter. And that the last accounting furnished to the defendants by the said T. Sutherland shows that the said T. Sutherland has an amount in hand arising from the proceeds of the securities deposited in his hands by defendants to an amount sufficient to meet the sums now sued for."

Notwithstanding the argument to the contrary by the plaintiff's counsel, the Court ordered the plaintiff to answer this affidavit, and adjourned the further hearing of the case till the 5th instant.

On Thursday, the 5th August, the above case was called on, when the counsel for the plaintiff not producing any affidavit to contradict the allegations in the defendant's affidavit, provisional sentence was, therefore, refused, with costs.

7. CAPE OF GOOD HOPE BANK v. ELLIOTT BROTHERS, AND SUTHERLAND.

[26th Aug., 1841.]

Bonâ fide Indorsees held entitled to Provisional Sentence, notwithstanding that the Defendant had a good Defence against the Payee.

C. G. H. Bank
v.
Elliott Bros.,
and
Sutherland.

The plaintiff claimed provisional sentence on another of the notes mentioned in the preceding reported case.

It was admitted by defendants that the Bank had discounted the notes some time before the first case respecting these notes came before the Court, *bonâ fide*, and in ignorance of the nature of the transaction between Sutherland and Elliott Brothers.

The Attorney-General, for Elliott Brothers, opposed the claim, and tendered the same *primi facie* evidence of usury

between Sutherland and the Elliotts, and of Sutherland having funds of the Elliotts in his hands, which he ought to have applied to the payment of this note, and maintained that if the Court gave provisional sentence against Elliott Brothers, execution thereon should be suspended until the plaintiffs should have first excused Sutherland.

C. G. H. Bank
v.
Elliott Bros.,
and
Sutherland.

Musgrave and Ebdon, *contra*, quoted D. 22: 1, 20, and maintained that provisional sentence should be given absolutely against both defendants, 1stly, because even if there were a law against usury in this colony, it went no further than merely to prevent the exaction of more than six per cent. by the creditor from the debtor, or to entitle the debtor to recover back what he had paid more than six per cent., and did not render the whole transaction null, and consequently could not be pleaded against a *bonâ fide* indorsee not having had knowledge or notice of the transaction, and 2dly, because there was no law against usury in this colony.

The Court held that as the plaintiff was a *bonâ fide* indorsee no objection which did not go to render the note absolutely null, but only afforded a defence to Elliotts against Sutherland, similar to those which were the grounds on which provisional sentence was refused in the two preceding cases, could be pleaded against the plaintiff; and that, without deciding whether by the law of the colony usury does or does not vitiate and annul the whole transaction, the defendants have not established such a *primâ facie* case that by the law of the colony usury does vitiate and annul the whole transaction, as to warrant the Court on that ground to refuse provisional sentence against Elliott Brothers; and therefore gave provisional sentence as prayed against both defendants.

8. DOBIE v. LAWTON.

[6th June, 1844.]

Circumstances entitling the Maker of a Promissory Note to claim that the Question whether the Holder of the Note was liable to the same Defences as the Original Payee, should be tried in the Principal Case.

Brand claimed provisional sentence against the defendant on a promissory note, dated 1st February, 1844, payable to Mr. John Jearey, or order, four months after date, for £309 17s. 2d., made by the defendant and indorsed by Jearey in blank, which was put in.

Dobie
v.
Lawton.

Ebdon, *contra*, put in a series of resolutions of Mr. Lawton's creditors, dated 26th January, 1844, to the following effect, to which he alleged Jearey had consented and which

Dobie
?
Lawton.

he had signed; and alleged that the plaintiff knew of the resolutions, and was, in fact, a party to them, and therefore took the note in question from Jearey under such circumstances as to place him in the same situation in which Jearey would be if he were plaintiff:—

“Resolved,—that the original creditors with whom Mr. Lawton has contracted debts, shall protect him against the demands of holders of his notes passed for such debts. That the notes passed by Mr. Lawton, in favour of his creditors, and remaining in their hands, together with the before-mentioned notes, be renewed when they shall become due, viz., for one-half by notes at four months, and for the remainder by notes at six months, with interest.

“That Mr. Lawton be authorised to carry on business, with the assistance of Messrs. Thomson & Watson and Isaac Chase, who are appointed inspectors to superintend the management of his affairs, who shall have power at all reasonable times to inspect his books, stock, &c., and with whom he shall confer as to purchases to be made, and who shall appropriate the funds which may be received towards the payment *pro ratâ* of his debts, or of such stock as it may be necessary for him to purchase. Such arrangements to continue until he shall have satisfied his present engagements, or be otherwise released.

“That this arrangement be binding upon the undersigned only in the event of all the said creditors consenting thereto.”

On the 26th January, 1844, a promissory note, dated 1st August, 1843, for £303 15s. 8d., by Lawton in favour of Jearey, or order, was in the Cape of Good Hope Bank, to whom it had been indorsed by Jearey. (This note was put in by the defendant.) It was admitted by the plaintiff that on the 1st February, Jearey, with his own funds, or those of Dobie, paid and took up the note from the bank, and obtained from Lawton the note now sued on, which he instantly indorsed to the plaintiff, who wrote on the back of the note of the 1st August, 1843:—

“1st February, 1844.

“Renewed by a bill, due the 1st June next.

“R. DOBIE.”

On granting the note of the 1st February, the note of the 1st August, with the memorandum on it of Dobie, was given up to Lawton.

Brand, in answer to this defence, referred to the last clause of the resolutions, and denied that all the original creditors had signed the resolutions. On the contrary, he was prepared to prove that two original creditors had not signed, but had been paid in full; and maintained that if the defendant averred that all the creditors had signed, he was bound

instantly to prove that by liquid evidence, or he could not resist the provisional claim. He also maintained that, the renewed note having become due, and not having been satisfied, the defendant had not "satisfied his present engagements;" and therefore, that the arrangement established by the resolutions, not having been complied with by the defendant, was no longer binding on the plaintiff. He also founded on the fact that the note sued on by the plaintiff had been granted by the defendant in violation of the conditions of the resolutions, inasmuch as it had been granted for the whole of the debt at four months; while, by the resolutions, the original note ought to have been renewed for one half at four months and for the remainder at six months; and that the defendant, having thus himself set aside the resolutions, could not now found on them as a defence.

Dobie
v.
Lawton.

Ebden, in reply, argued *contra*, and quoted the case of *Holmes v. Love*, 3d Barn. & Cres. 242.

Brand stated that the present case differed from that quoted, inasmuch as the condition in the deed of composition in that case was resolutive, whereas the condition in the agreement in this case is only suspensive.

The Court deferred judgment.

Postea (June 14, 1844).—The Court expressed their opinion that the defendant by the admission of plaintiff that he had paid wholly or in part, the original note to the bank after it was overdue and by the memorandum signed by him on the back of this note, had proved such facts against the liquidity of the plaintiff's claim as a *bonâ fide* indorsee of the renewed note, as to entitle him to resist provisional sentence and insist that the question, whether the plaintiff was entitled to the privileges of a *bonâ fide* indorsee, or was liable to any defence competent to the defendant against the indorser, should be tried in the principal case; and, therefore, refused provisional sentence. Costs to be costs in the cause.

9. SEARIGHT & CO. v. LAWTON.

[6th June, 1844.]

Defence against a Provisional Claim on a Promissory Note that the Plaintiffs, with other Creditors, had entered into an agreement to give time to the Defendant, on certain conditions.

Brand, for the plaintiffs, claimed provisional sentence on three promissory notes, signed by the defendant, which he put in.

Searight & Co.
v. Lawton.

Searight & Co. v. Lawton. Ebden, for defendant, put in the resolutions of the creditors put in in the previous case, and stated that this case only differed from the preceding one in this, that here the plaintiff was himself the original creditor who signed the resolutions. Secondly, that the plaintiff sued on the original bills, which he himself had, when due, paid and taken up from the persons to whom he had endorsed them, and not on notes renewed under the provisions of the resolutions. Thirdly, that the plaintiff had not taken renewed notes, although defendant had tendered them to him; and referred to his agreement in the preceding case.

Brand, in answer, referred to his arguments in the preceding case; and further argued that if the Court held that he was not entitled to maintain that the *onus* rested on defendant of proving that all the creditors had signed the resolutions, he was entitled to prove *instantly* that there were two creditors who had not signed; and tendered the evidence of a witness to prove that fact.

Ebden, in reply, objected to the production of witnesses or affidavits to prove the facts proposed to be proved.

The Court decided that the plaintiffs were not entitled to produce the evidence tendered by them in answer to the defendant's defence, and in support of the claim for provisional sentence.

Brand then argued in answer to the defence on the fact, that in this case the plaintiffs had not satisfied the resolutions by taking renewed bills.

The Court deferred its decision.

Postea (14th June, 1844).—The Court gave judgment on the following grounds:—

The plaintiffs in this case claim provisional sentence on three promissory notes, respectively dated 27th July, 2d August, and 27th October, 1843, and payable on the 27th January, and 2d and 27th February, 1844, made by defendant in favour of plaintiffs.

These notes are, *ex facie*, intrinsically unexceptionable liquid documents of debt, entitling the creditors to demand immediate payment of them, on a day which is now past. But the defendant has alleged that the plaintiffs, subsequently to the date of those notes, entered into an agreement with the defendant, by which they bound themselves not to demand payment of them when they should become due, nor until the defendant's business, managed with the assistance and advice of two of his creditors, should furnish assets sufficient to discharge wholly or in part those debts, at the same time, or, *pro ratâ*, with all the other debts of the same kind due by defendant to other creditors. And in support of this defence, the defendant has produced the document containing certain

resolutions, passed and agreed to by his creditors, at a meeting held on the 26th January, 1844, signed by the plaintiffs. (*Vide Dobie v. Lawton, supra.*)

Searight & Co.
v.
Lawton.

Plaintiffs have admitted their signature to this document.

It is also admitted that the plaintiffs have acted under and in pursuance of the provisions of this agreement, to the extent, at least, that, in terms of the first provision, they have protected the defendant from the persons who, at the time of the resolutions, were holders of the note now sued on, or some of them, by taking up and paying the same to the holders, and by suffering the defendant, from the 26th of January to the date of this suit, to manage his business under the agreement, without making any demand whatever on defendant for payment of those over-due notes. It is also admitted that a great many (if not all) of defendant's creditors, on debts of the same kind with those of plaintiffs, and who with them in the said agreement are designated "original creditors," have acted under the agreement by protecting the defendant, by paying and taking up from the persons who held them on the 26th of January defendant's notes and bills, by taking renewed notes from defendant in their place, and by allowing him to manage his business. And it is not denied that those proceedings of the other creditors have all been known to, and at least tacitly acquiesced in, by the plaintiffs.

In reply to the defence founded by defendant on the agreement signed by the plaintiffs, the latter have referred to that clause of the agreement which declares and provides "that this arrangement be binding upon the undersigned only in the event of all the original creditors consenting thereto;" and have maintained that in virtue of this clause the defendant cannot found on this agreement as a defence against their claim: first, if he shall not first prove that all the original creditors have consented to it; which they deny, and have named two persons whom they allege to be such original creditors, who have not consented to it, but received payment in full: or, 2dly,—if the Court shall hold that the *onus* of proving this does not lie with the defendant,—then, provided the plaintiffs shall prove this fact; to prove which they have both tendered a witness and affidavits.

By the agreement, plaintiffs' signature to which is admitted, the defendant has proved, *scripturâ*, that the plaintiffs, subsequently to obtaining possession of the liquid documents of debt on which they have claimed provisional sentence, entered into a written agreement, the effect of which is completely to destroy the liquidity of the original documents of debt, in so far as relates to the term of payment; and to make the term

Searight & Co. of payment depend altogether on the validity and effect of
v. this subsequent writing, which must be considered in law as
Lawton. affecting the original document of debt, as much and in the same way as if it had been endorsed on them, or its contents embodied *in gremio* of them.

It is true, that if the plaintiffs can *instantly* plainly show that this agreement is now null and of no effect, the liquidity of the original documents of debt will revive. And if the last clause in the agreement be clearly a condition suspensive, and nothing has been done to waive it or impair its effect as a suspensive clause, then the agreement cannot be founded on by the defendant as valid and binding on the plaintiffs, unless he shall prove that this condition has been performed.

It has been maintained that this condition is a resolutive and not a suspensive condition; and if the Court were of opinion that a doubtful question of law arose out of the terms of this clause, as to its legal character, this would be sufficient to warrant the Court to refuse the provisional sentence, in order that this question of law might be decided in the principal case.

But it is unnecessary to decide this question; for even admitting, what there seems no reason to doubt in law, that this clause was originally a suspensive condition, of such a nature and effect that if, immediately after the signing of the agreement, and before the plaintiffs had identified themselves with it by doing or suffering anything to be done in compliance with, or in execution of, its provisions, they had brought an action for provisional sentence on the notes, the defendant would not have been entitled to found on the agreement in defence against it, unless he could prove that the condition had been performed,—it is impossible to maintain that this clause can now have given to it the effect of a *suspensive clause*, when the defendants and all the creditors who have signed it have, as is proved by the admitted facts above set forth, been themselves acting and suffering others to act, in compliance with, and in execution of, its provisions. If these facts have not the effect of causing the plaintiffs to be deemed in law to have waived this condition altogether, and so to have annulled it, the utmost effect which, after the occurrence of these facts it can have, is that of a resolutive condition.

It is not necessary, in order to entitle the defendant to oppose the provisional claim, that he should be able now to establish his defence, founded on this agreement, as clearly and fully as he would be required to do in the principal case. He has made out a good defence against the provisional claim by proving, *instantly*, by the signature of the plaintiffs, and by their own admission, that the plaintiffs have signed such a

deed, and done and suffered such acts to be done as to destroy the liquidity of the original document of debt, in so far as relates to the term of payment,—seeing that the Court cannot decide whether they are entitled now to demand payment of those debts, without first deciding the questions of law and of fact which have clearly been raised by the document signed by the plaintiffs and by the facts admitted by them, which the Court can only decide in the principal case; for,—as by this last-mentioned document and admission of facts, the plaintiffs have precluded themselves from being able to found their demand solely on their original liquid documents, and the justice and probable success of their claim depends altogether on the legal effect of the agreement signed and the facts admitted by them, (which, instead of furnishing liquid evidence in support of their claim for provisional sentence, raise questions of law and of fact at least doubtful,)—the plaintiffs are not entitled by law to support their claim to provisional sentence by now leading evidence to establish a claim, originally liquid, but rendered illiquid by their own acts.

Searight & Co.
v.
Lawton.

On these grounds, the Court refused provisional sentence. The costs to be costs in the cause.

10. DICKSON, BURNIE & Co. v. LAWTON.

[6th June, 1844.]

Provisional Sentence refused on a Promissory Note given in renewal of another Promissory Note, with respect to which the Plaintiffs, as well as other Holders of Notes of the Defendant, had agreed to give him Time on Certain Conditions.

The circumstances in this case differed from those in Searight & Co. v. Lawton only in this,—that the note on which plaintiffs claimed provisional sentence was a note taken by them from the defendant, under the agreement, in renewal of a note of his, on which they had been the original creditors, and which, when due, they had paid and taken up from the holders to whom they had endorsed it, and given up to the defendant on receiving the renewed note.

Dickson,
Burnie & Co.
v.
Lawton.

The same defence was made by Ebdon for the defendant.

Cloete, in answer, had quoted Cens. For. p. 2, b. 1, chap. 24, § 8; and Van der Linden's Inst., b. 3: pt. I, c. 2, § 12, p. 407.

Dickson,
Burnie & Co.
r.
Lawton.

The Court held that the decision in *Searight & Co. v. Lawton* must govern this case, because, in addition to the circumstances in respect of which that case was decided, the document of debt here founded on is a renewed note given by defendant, and taken by plaintiffs, under and in compliance with the provisions of the agreement. And refused provisional sentence. Costs to be costs in the cause.

11. BORRADAILES & CO. v. LAWTON.

[6th June, 1844.]

Circumstances amounting to a Defence against a Provisional Claim on a Promissory Note.

Borradailes
& Co.
r.
Lawton.

In this case the plaintiffs claimed provisional sentence, 1st, on a note for £95 11s., dated 6th November, 1843, and payable 1st June, 1844, made by defendant in their favour, and of which they had always been the holders, *not having discounted it*. The Court held that these circumstances did not distinguish this case from that of *Searight & Co. v. Lawton*.—2dly: on a note for £564 8s., dated 23d October, 1843, payable 23d May, 1844, made by defendant in favour of Isaac Chase, and of which plaintiffs became the holders by a blank endorsement from Chase, as they alleged, previously to the 26th January, 1844.

Ebden, for defendant, made the same defence as in the other cases (pp. 103–110).

The Attorney-General, in answer, maintained that the condition in the last clause of the agreement was suspensive and not resolutive; and quoted *Wiglesworth v. White*, 1 Starkie, 218, to prove the distinction between this case and that of *Holmes v. Love*, 3 B. & C. 242, which had been quoted, in which the condition was resolutive and not suspensive. [But see *Hotham v. E. I. Company*, 1. T. R. p. 638, referred to by Mr. Justice Musgrave.] He also quoted *Evans' Pothier*, 1st vol. p. 126–129, to show the distinction between the effect of conditions suspensive and resolutive: and *Voet* 42: 1, § 6–10, to show what may be maintained as a defence against a claim for provisional sentence. 2dly, he maintained that, as plaintiffs had not got the note as “original creditors,” and as it had been endorsed to them by Chase, who was the “original creditor” in it, the plaintiffs, who were merely indorsees and not “original creditors,” were not as to it bound by their signature to the agreement which was

applicable to original creditors,—and this, whether the note had been indorsed to them before or after the 26th January, 1844.

Borradailes
& Co.
v.
Lawton.

Ebden, in reply, maintained that if the indorsation were subsequent to the 26th January, then the plaintiffs were in precisely the situation as Dobie (*vide* Dobie v. Lawton, p. 103);—and if prior to the 26th January, then they were now in the same situation as Chase, the “original creditor” and the indorser of the note, would have been. And, in proof that it was the intention of plaintiffs, by signing the agreement, to bind themselves not only as “original creditors,” but as to notes held by them as indorsees from original creditors, he put in two notes, both of them made by defendant in favour of Chase, and by him blank indorsed, having written thereon memoranda, respectively dated 23d April, and 2d May, 1844, in the handwriting of, and signed by, plaintiffs, to the effect that each of them had been “settled by two renewed bills at four and six months” respectively.

The Court refused provisional sentence in this case on the note for £95 11s., on the same grounds on which the case of Searight & Co. v. Lawton was decided; and also for the note of £564 8s., which the plaintiffs held as blank indorsees of Chase, because, although,—seeing that the agreement of the 26th of January purports only to apply to the case of, and bind what are therein designated, “original creditors,”—and that the plaintiffs, while they were “original creditors” on the note for £95 11s., yet were not “original creditors” on the note for £564 8s., of which they had become the holders by indorsation from Chase, who was the “original creditor,” in the sense of the agreement, on that note,—it by no means follows that their signature to a deed applicable to the case of, and purporting to bind only, “original creditors,” should necessarily, *per se*, afford any ground of defence against their claim for provisional sentence on a note on which they were not “original creditors,” and to which, therefore, the deed, *ex terminis*, did not apply, (as such signature ought, in the absence of all proof to the contrary, to be deemed to have been affixed to the deed with reference only to the debt in which they were “original creditors,”)—yet the defendant having proved, by the production of the notes of the 23d October, 1843, payable 23d April, 1844, and of the 2d November, 1843, payable 2d May, 1844, having the memoranda above set forth indorsed thereon and signed by the plaintiffs, that the plaintiffs have acted in compliance with, and in the exercise of, the provisions of the agreement with respect to two other notes held by them on the same title, and in the same character, on and with which they hold the note in question, and thus have themselves, by their own acts, raised

Borradailes
& Co.
v.
Lawton.

a question as to whether it was not their intention, in signing the agreement, to bind themselves, not merely as "*original creditors*," but generally as *creditors*,—has proved enough to bar the plaintiffs from claiming provisional sentence on this note, and to make it necessary for them to have the question tried and decided in the principal case, before they can obtain judgment against the defendant. Costs to be costs in the cause.

12. DICKSON, BURNIE & CO. v. HARLEY.

[12th July, 1844.]

Defence against the Indorsees of a Promissory Note that the Note had been indorsed by the Payee long after it was due, the Circumstances being such as not to entitle the Payee to Provisional Sentence.

Dickson,
Burnie & Co.
v.
Harley.

The plaintiffs claimed provisional sentence on four promissory notes, all dated 27th April, 1835, made by defendant in favour of James Anderson, and specially indorsed by the said Anderson to them.

Defendant admitted his signature to the notes, but put in an affidavit in which he stated that the said notes were made by him in England, where he and Anderson then had their domicile; that in 1835 and 1836, in consequence of having been arrested by a creditor, and imprisoned in the King's Bench, he applied for and duly obtained his discharge under the Insolvent Statute then in force in England: that he duly complied with all the requisites of the Statute, and, in particular, duly assigned all his property and effects to his assignee, and filed a correct schedule of his debts and debtors, in which were inserted the four notes now sued on, and the name of Anderson as being the creditor on them;—that Anderson was duly summoned along with his other creditors to show cause against his discharge, and attended in Court, when he received his discharge: that the notes were not indorsed by Anderson to the present holders until long after they had been overdue and protested: that not long ago, and while in the colony, he had had an application from Anderson to pay the notes: and that under these circumstances neither Anderson nor the plaintiffs, as deriving right from Anderson, could legally sue him for payment of the notes.

On the first note, at five months' date, which the plaintiffs put in, there was posted a notarial ticket by a London

notary, showing that the bill had been duly protested when it became due, in July, 1835, at the instance of Anderson.

The Court held that, under all the circumstances of the case, provisional sentence must be refused, a course of proceeding the Attorney-General admitted he was not in a situation to object to.

Provisional sentence refused with costs.

Dickson,
Burnie & Co.
v.
Hartley.

13. MECHAU v. VAN JAARSVELD.

[20th May, 1847.]

Defence in a Provisional Claim on a Promissory Note against the Payee, who had indorsed it, that the Note had been sold absolutely and without recourse to the Plaintiff. Notice of Dishonour through the Post Office.

In this case, the plaintiff claimed provisional sentence on two butchers' notes, one of £450 and the other of £256 10s., as being the legal holder of them by indorsation of the defendant, the payee.

Mechau
v.
Van Jaarsveld.

Ebden, for the defendant, objected that he had not discounted these notes with the plaintiff, but had sold them to him, absolutely and without recourse; and, among other circumstances in support of this averment, stated in the affidavit made by him, that the sums he received from plaintiff by cheques on the South African Bank were so much less than the amount of the notes, that, if they were considered as discount, it would, in the one case, have been at the rate of twenty-five per cent., and in the other, of thirty per cent., for the time which the notes had to run, and would consequently have been usurious; and that this difference must therefore be held to have been the consideration which was given by defendant to induce the plaintiff to purchase the notes from him without recourse.

He called on the plaintiff to produce the cheques; which were then put in by the plaintiff, and proved the correctness of the defendant's averment as to the difference between the amount of the notes and that of the cheques.

The defendant also objected that due notice of the dishonour of the notes by the maker had not been given to him.

The plaintiff produced a notarial protest, which set forth that on the day after the dishonour the notary had, at the request of the plaintiff, written a letter notifying the dishonour, and addressed to the defendant, Berg River, Division of Stellenbosch, and put the letter into the Post Office.

Mechau
v.
Van Jaarsveld.

Defendant replied that his place at Berg River was situated in the Division of Malmesbury; and that, therefore, even although it should be held in this colony, notwithstanding the difference of its postal regulations from those of Great Britain, that the proof of putting a letter into the Post Office, properly addressed to the defendant, was sufficient proof of notice of dishonour,—this could not be deemed sufficient notification of the dishonour to the defendant in this case, because the letter put into the Post Office had a wrong address.*

The Court held that as the production of the cheques given by the plaintiff to the defendant for the notes proved that a sum so much less than the value of the notes had been given for them, and as it was not to be presumed without proof that the plaintiff had committed usury, the defendant had by liquid documents made out to a certain extent a *prima facie* case of the truth of his allegation that the transaction was not a discounting of the notes, but an out and out sale of them without recourse; and that as the plaintiff could not found on the posted letter without proving that it was rightly addressed,—which fact was denied,—it was necessary for him to produce other evidence to support his claim, before he could obtain a decision in his favour; and on both grounds refused provisional sentence. Costs to be costs in the principal case.†

14. THERON v. SCANLIN.

[13th March, 1848.]

Circumstances affording a Defence to Provisional Claim on a Promissory Note.

Theron
v.
Scanlin.

In this case, the plaintiff claimed provisional sentence for £600 upon a promissory note bearing date the 1st June, 1847, payable six months after date, made and signed by the defendant in favour of McMaster & Pakenham, and by them indorsed in blank, and whereof the plaintiff is the legal holder.

The plaintiff put in the note sued on.

The defendant pleaded in defence that the plaintiff was not a *bonâ fide* onerous indorsee, but acted merely as the agent of McMaster & Pakenham, the original payees. This was admitted. Defendant then put in an invoice of sundry goods which had been bought from McMaster & Pakenham by him,

* (*Postea*, in the principal case, 17th August, 1847.)—The Court found this to be his proper address, and that the posting of it so addressed caused it to be conveyed by post to where, by his desire, newspapers were sent by post, and was therefore sufficient notice of the dishonour.

† In the principal case, the defendant was absolved from the instance.

at the bottom of which what follows was written in the handwriting of one of the partners, and signed by him with the signature of the firm:—

Theron
v.
Scanlin.

“Received 1000 sheep, at 10s..... £ 500

“Three notes at six, twelve, and eighteen months 1800

“Being the amount agreed for the above purchase £2300

“McMASTER & PAKENHAM.

“Fifty bales wool to be taken at 1s. per lb., delivered at Graham's Town, on account of the first bill. The wool to be of good quality (say best) and to be in marketable condition.

“M. & P.”

And stated that the note sued on was the first bill referred to in the above memorandum; and maintained that it was expressly agreed on and understood by the parties that the wool to be so delivered was to be of the first clip which should take place after the date of the transaction; and tendered affidavits to show that the season for shearing and bringing to market wool in the Eastern districts was from the middle of January to the middle of May, and that this year, in consequence of the wetness of the weather, the shearing was unusually late; and stated that he had bought from the wool-growers the necessary quantity of wool, and would deliver it as soon as it was possible to bring it to market.

The plaintiff did not deny any of these allegations, except that the wool was to be of the next clip; and on the contrary maintained that there was no specification as to what clip the wool was to be of; and that the agreement between the parties, as was evident from the terms of the memorandum, was, that the first note should be paid on the day it became due, the defendant having the privilege, if he thought fit, of *then* paying it in wool.

The Court (the Chief Justice absent on circuit) refused the provisional sentence. Costs to be costs in the principal case.

They held that as, from the circumstances of the Eastern Districts and the course of the trade in wool, it would have been difficult, if not absolutely impossible, for the defendant to have purchased wool there during the period between the 1st June and the 1st December, 1847, on which last date the note was made payable, there was strong reason for presuming that the defendant's allegation, that it was agreed and understood that the wool was to be of the next clip after the transaction, was true; and that defendant had not yet had a reasonable time to deliver at Graham's Town wool of that clip.

By consent the case was removed to the Circuit Court for Albany. [In the principal case judgment was given for the plaintiff, as prayed.]

CHAPTER IV.

SUMMONS AND ITS REQUISITES.

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|----|-------------------|---|---|----------------------------------|
| 1. | COPY OF DOCUMENT* | — | — | INDORSEMENT OF PROMISSORY NOTE. |
| 2. | — | — | — | VARIANCE. |
| 3. | — | — | — | EFFECT OF NON-SERVICE OF COPY. |
| 4. | — | — | — | NOTARIAL PROTEST OF DISHONOUR. |
| 5. | — | — | — | REGISTERED BOND. |
| 6. | — | — | — | JUDGMENT. |
| 7. | — | — | — | AFFIDAVIT OF NOTICE TO PAY BOND. |
| 8. | — | — | — | VARIANCE. |
| 9. | — | — | — | DITTO. |
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1. WOLHUTER *v.* VAN HELTINGS.

[1st August, 1833.]

The Copy of a Promissory Note on which an Indorsee claims Provisional Sentence, must contain a Copy of the Indorsement through which Title is acquired.

Wolhuter
v.
Van Hellings.

This was a claim for a provisional sentence for payment of a promissory note, made by the defendant in favour of Sandenbergh, or order, and indorsed by Sandenbergh.

Cloete, for the defendant, objected that provisional sentence could not be given against the defendant, because he had not, as required by the 12th rule, been served with a copy of the instruments or documents, upon which the claim was founded, having only been served with a copy of the note, without any copy of the indorsement on it.

The Court held the objection good, and were on the point of refusing provisional sentence, when the plaintiff withdrew the case, with costs to the defendant.

* *Vide* Rule 12 (*supra*, p. 9).

2. RICHTER v. DE KOCK.

[6th August, 1833.]

Variance between the Name of the Defendant and the Name of the Debtor appearing in the Copy of the Bond on which Provisional Sentence was claimed against the Defendant.

Michael de Kock, *Joseph's son*, and residing at *Welgedaan*, in Table Valley, was summoned to plead to a provisional claim.

Richter
v.
De Kock.

Along with the summons there was served on the said person, as the copy of the document on which the claim was founded, the copy of a notarial bond, in which Michael de Kock, *Josias' son*, residing in Table Valley, was set forth as the debtor.

M. de Kock, *Joseph's son*, appeared by his counsel, Brand, and objected that even although the plaintiff should now produce a bond granted by him, M. de Kock, *Joseph's son*, he was not entitled to have provisional sentence against him, the defendant, because no copy of such a bond, but the copy of a different bond had been served on him, and that this objection was strengthened by the fact that the bond, now produced as the original in the notary's protocol, set forth M. de Kock, *Josias' son*, as the debtor, and the notarial copy thereof, in possession of the plaintiff, had originally set forth *Josias' son* as the debtor, but had at some later period been altered into *Joseph's son*.

The Court, under all the circumstances of this case, held that the plaintiff was not entitled to provisional sentence in respect of the documents produced; and refused provisional sentence, with costs.

3. SIMPSON & Co. v. FLECK.

[27th August, 1833.]

Non-service of a Copy of a Document exhibited, entitles the Defendant only to take a Day to see the Copy.

In this case, in which a question had been raised whether the plaintiffs could put in a notarial protest to prove the dishonour of a promissory note by the maker, no copy of this protest having been served with the summons, and before the Court had decided this question, Cloete, for the plaintiffs, stated that the defendant, in respect of his objection of want of service of the copy, was entitled to nothing more than to take a day to see the copy, and quoted Van der Linden, Inst., b. 3, p. 1, c. 2, § 12, p. 408.

Simpson & Co.
v.
Fleck.

The Attorney-General, for the defendant, admitted this, and took till the 30th instant to see the protest.

4. RENS v. VAN DER POEL AND DE ROUBAIX.

[2d December, 1834.]

A Copy of the Protest for Non-payment of a Bill need not be served on the Defendant.

Rens
v.
Van der Poel
and
De Roubaix.

In this case, the Court held that it was not necessary under the 12th rule, in order to enable a plaintiff to claim provisional sentence against an indorser, to serve on the indorser, along with the summons, a copy not only of the bill, but also of the protest, which had been taken either against the indorser himself or the acceptor.

[This point had been considered doubtful in Simpson & Co. v. Fleck, *supra*.]

5. BORCHERDS, N. O., v. DE WET.

[9th December, 1834.]

Where a Registered Bond has a Certificate of Registration indorsed on it, it is not necessary that the Copy of such Bond served on the Defendant should contain also this Certificate of Registration.

Borchers,N.O.
v.
De Wet.

The summons in this case set forth that the claim for provisional sentence was founded on a certain registered bond.

The bond had actually been registered, and had a certificate of registration, by the proper officer, indorsed on it.

Stoll, for the defendant, objected want of due service of the copy of the bond, in respect that the copy served on him had no copy of this certificate of registration.

The Court overruled the objection, and granted provisional sentence, as prayed.

6. A. v. B.

[3d January, 1835.]

In no Case is it Necessary to serve on a Defendant the Record, or an Office Copy of any Judgment of the Supreme or Circuit Courts.

A. v. B.

In this case, the Court declared that in future they would adhere to the following rule of practice:—

In no case, where at the hearing it shall be necessary to produce in evidence the record or an office copy of any judgment of the Supreme or Circuit Courts, shall it be necessary to serve a copy of the same with the summons.

7. NEDERLAND'S EXECUTORS v. GNADE.

[24th February, 1835.]

It is not necessary to serve on a Defendant a Copy of the Affidavit to prove the Notice calling in a Bond.

In this case, where provisional sentence was claimed on a bond stipulating three months' notice before payment could be demanded, the Court held that it is not necessary to serve with the summons a copy of the affidavit by which it is to be proved that such notice was given, and therefore that a variance between the original and the copy served was of no consequence, the copy served containing nothing which could mislead the defendant.

Nederland's
Executors
v.
Gnade.

8. BRINK v. NAPIER.

[1st May, 1837.]

When a Variance between the Promissory Note sued on and the Copy served, is Immaterial.

This was an application for provisional sentence on the following promissory note:—

"£40.

"Cape Town, 11th January, 1837.

"Three months after date I promise to pay Mr. G. D. Baumbgardt, or bearer, the sum of forty pounds, for value received.

"CHARLES NAPIER."

This note was indorsed—

"G. D. BAUMGARDT."

which signature was so written that the two last letters bore a greater resemblance to *ett* than to *dt*, but could, after careful inspection, be read *dt*.

The summons commanded the defendant to render to the plaintiff the sum of £40, &c., "which he owes to, &c., by virtue of a certain promissory note passed by the said Charles Napier to and in favour of one G. D. Baumbgardt, or bearer, and indorsed by the said G. D. Baumbgardt in blank," &c.

In the copy of the note served on the defendant the name indorsed was plainly and distinctly written and spelt as if the name was Baumgarett.

The Attorney-General, for the defendant, contended that in consequence of this alleged difference between the actual name of the indorser, and that set forth as such in the copy of the note, he was entitled to object to provisional sentence.

But the Court held that as the defendant had been served

Brink
v.
Napier.

Brink
v.
Napier.

with what might be considered not merely as a copy, but rather as a *fac simile* of the indorsation, there was no foundation for the objection.

2dly. He objected that as the name of the indorser, as written in the indorsation, was Baumgardt, and as in the summons the note was described as having been indorsed by one G. D. Baumgardt, this was such a variance as entitled him to have the summons dismissed.

3dly. He contended that as in the note the name of the payee was Baumgardt, and the name indorsed was Baumgardt, the indorser was *ex facie* a different person from the payee, and therefore provisional sentence ought not to be given.

But the Court held that, as the note was made payable to Baumgardt, or *bearer*, no indorsation was necessary to vest the right in the note in the plaintiff, and therefore it was surplusage to set forth in the summons any thing concerning the indorsation, and on these grounds repelled both objections, without deciding the point whether the variance of the letter *b* in the name of the indorser, as written in the indorsation, and described in the summons, was a material variance. But it rather seemed to be considered that it was not a material variation, and that, even if the note had not been made payable to the bearer, no effect would have been given to the third objection, unless the defendant would aver that the person who had indorsed the note, was actually a different person from the payee of the note.

9. ATKINSON v. NORDEN.

[12th July, 1843.]

What constitutes a Material Variance between a Promissory Note and the Copy served.

Atkinson
v.
Norden.

In this case, the defendant was summoned to show cause why provisional sentence should not be given against him for £110 15s. 4d., on a promissory note, dated 4th April, 1842; and to acknowledge or deny his signature to the note.

The amount of the note was correctly set forth in the summons; but the copy of the note served on defendant, along with the summons, was as follows:—

“£110 15s. 4d. “Graham’s Town, 4th April, 1841.

“Twelve months after date I promise to pay to Benjamin Norden or order, *the sum of and ten pounds*, fifteen shillings and four-pence for value received.

(Signed) “M. NORDEN.

(Indorsed) “BENJAMIN NORDEN.”

Plaintiff produced the original note.

Defendant objected to provisional sentence being given against him on a note which varied so much from the document which had been served on him as the copy of the note to acknowledge or deny his signature to which he had been summoned.

Atkinson
v.
Norden.

The Court held that the variance was such as to entitle the defendant to object to provisional sentence being given, although not of such a nature as to entitle him to insist that the case should be dismissed out of Court, and, therefore, merely refused provisional sentence, leaving it to the defendant, if he saw fit, to proceed with the principal case.

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1. DESCRIPTION OF DOCUMENT IN SUMMONS—OMITTED.
 2. ——— DEFECTIVE.
 3. ——— AVERMENT OF INDORSEMENT OF BILL.
 4. ——— NON-ALLEGATION OF PRESENTMENT FOR PAYMENT.
 5. ——— JUDGMENT OF INFERIOR COURT.
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1. HOVIL & MATHEW v. SAUNDERS & JOHNSTONE.

[2d December, 1833.]

Non-Description, in the Summons, of the Notes on which the Provisional Claim was founded.

In this case, provisional sentence was refused, in respect that the summons did not describe (in terms of the 12th rule) the note on which the claim was founded, in any way, but merely stated its date.

Hovil &
Mathew v.
Saunders &
Johnstone.

2. STURGIS v. MORRIS.

[2d December, 1833.]

What is the Proper Description of a Document in the Summons.

In this case, provisional sentence was refused, in respect that the summons did not describe the bond sufficiently, as it did not state in whose favour it was passed.

Sturgis
v.
Morris.

Menzies, J., doubted whether this decision did not construe the rule too strictly.

Sturgis
v.
Morris.

Postea (3d December, 1833).—The Attorney-General called the attention of the Court to the terms of the 12th rule, and to the above case of *Sturgis v. Morris*, and showed that the rule did not require that the summons should state in whose favour the note or other instrument sued on was made.

The Court, in consequence, allowed the plaintiff in the above case to take a new summons without fees; but stated, that the Court expected that, in future, the instrument sued on should be so described in the summons as to show on the face of the record the ground of the defendant's liability to the plaintiff.

3. MOORE v. ALEXANDER.

[10th June, 1834.]

In a Provisional Claim by an Indorsee of a Bill of Exchange the Summons must aver the Indorsement.

Moore
v.
Alexander.

In this case, provisional sentence was claimed on a bill, drawn by Nicholls, on, and accepted by, Alexander, payable to the order of the drawer, and blank indorsed by the drawer.

The defendant did not appear; but the Court *ex mero motu* refused provisional sentence, because the plaintiff in his summons did not aver the indorsement, as required by the 12th rule.

4. RENS v. VAN DER POEL AND ANOTHER.

[2d December, 1834.]

It is not necessary, in a Claim against the Indorser of a Bill of Exchange, to allege that the Bill had been presented to the Acceptor and that Payment had been refused.

Rens
v.
Van der Poel
and another.

In this case, where provisional sentence was claimed against the indorser of a bill, the Court gave provisional sentence against him, although the summons merely averred that the bill had been indorsed by the defendant, and did not allege (what the plaintiff proved by a notarial protest) that the bill had been presented for payment to the acceptor, that payment had been refused, or any other circumstances from which due negotiation could be inferred.

5. MALAN v. THERON.

[2d May, 1837.]

Summons Defective on account of an Insufficient Description of the Judgment of an Inferior Court, on which Provisional Sentence was claimed.

Malan
v.
Theron.

This was an application for provisional sentence in virtue of a sentence of the Resident Magistrate of Cape Town. But the summons only set forth the sentence as follows, without specifying the district of the court by which the sentence had been given :—

“Upon and by virtue of certain judgment obtained by the said S. Malan against the said H. Theron in the court of the Resident Magistrate, bearing date the 19th of April, &c., 1837.”

The summons directed the sheriff to serve on the defendant a copy of the summons and of the said judgment.

The return of the sheriff stated that he had served the summons on the defendant personally, and delivered to him a copy thereof, and of the judgment.

The defendant did not appear.

The Court dismissed the summons as defective, inasmuch as it contained no description of the judgment of the Resident Magistrate sued on, which was sufficient to identify it with the judgment of the Court of the Resident Magistrate of Cape Town, an extract of the record of which was now produced by the plaintiff, as the evidence in support of his claim.

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| 1. | FORM OF SUMMONS—DEFECTIVE. |
| 2. | — DESCRIPTION OF PLAINTIFFS. |
| 3. | — DESCRIPTION OF DEFENDANT. |
| 4. | — DITTO. |
| 5. | — ALLEGATIONS UNDER RULE 12. |
| 6. | — OMISSION OF THE WORD “PROVISIONAL.” |
| 7. | — MISJOINDER. |
| 8. | — DESCRIPTIVE WORDS. |
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1. DE VILLIERS v. ADENDORFF.

[13th March, 1828.]

Summons found Defective in not calling on the Defendant to acknowledge or deny his Signature to the Document sued on.

The Court refused provisional sentence with costs, on a summons whereby the defendant was summoned merely “in De Villiers v. Adendorff.

De Villiers
v.
Adendorff.

order, as well provisionally as in the principal case, to hear claim, &c., for Rds. 222, being the amount of the balance of account due by the defendant to the plaintiff, with costs," without calling on defendant to acknowledge or deny the validity of his signature *to any* writing whatever.

The defendant acknowledged that copies of certain writings which plaintiff now proposed to produce in evidence of his claim had been served on him, but refused to acknowledge or deny his signature to them, not having been summoned so to do. *Vide* Van Leeuwen's Rom. Dutch Law. b. 5, c. 24, § 6, p. 629.

2. FARMER v. OWEN.

[12th August, 1834.]

Summons found Defective, the Plaintiffs not having been sufficiently described.

Farmer
v.
Owen.

In this case, in which the plaintiffs really were two individuals named William Farmer and Henry Farmer, trading under the firm of William and Henry Farmer, the defendant was summoned to render to "William & Henry Farmer," trading under the firm and style of W. & H. Farmer.

On the objection being taken by the Attorney-General, the Court unanimously dismissed the summons, on the ground that the plaintiffs were not sufficiently described and set forth by the words "William & Henry Farmer."

Dismissed with costs.

3. RENS v. HEYDENRYCK.

[2d February, 1835.]

What is a Sufficient Description of the Defendant.

Rens
v.
Heydenryck.

In this case, the defendant was described in the summons as Jan C. Heydenryck, of Burgher's Post, in the Cape district.

Defendant did not appear.

The Chief Justice was of opinion that no judgment could regularly be given, or execution issued on any judgment given, against Jan C. Heydenryck, C not being a name.

The other Judges, without giving any opinion as to what ought to be the decision of the Court, if the defendant had appeared and put in a plea of abatement, held that, in the absence of any objection, and under the circumstances of the colony, the defendant must be held to be sufficiently described to warrant judgment and execution being issued against him as Jan C. Heydenryck.

4. NORDEN *v.* HOOLE.

[31st August, 1835.]

What is not a Sufficient Description of the Defendant.

This case was withdrawn in consequence of the Court having expressed their resolution not to proceed on the summons, in which the defendant was described only as J— Hoole, of Graham's Town, in the district of Albany.

Norden
v.
Hoole.

5. MULLER *v.* DE KOCK

[1st February, 1838.]

What Allegations are Sufficient in a Summons under the 12th Rule.

The plaintiff in this case claimed provisional sentence on a bond, whereby the defendant acknowledged himself to be indebted to the plaintiff, in the sum of £30, lent and advanced to him by plaintiff, and engaged to repay the same to the plaintiff in monthly instalments of £2, on the 15th of each month, until the above capital shall be paid off.

Muller
v.
De Kock.

"Should the said appearer, however, fail in the payment of the instalments at the stipulated periods, the said Muller shall have the right to demand the whole sum at once without delay."

The Chief Justice took an objection, that the summons was irregular and insufficient to found the claim for provisional sentence, in respect that the summons did not allege that the defendant had made default in the payment of the monthly instalments, and consequently did not allege that without which the plaintiff would not have been entitled now to claim immediate payment for the whole debt.

But the rest of the Court held, that under the 12th rule, it was not required that the summons should have contained such allegations, and that provisional sentence had in practice constantly been given on similar summonses, and that the like practice had invariably prevailed as to summonses on bonds in which payment was not demandable until after three months' notice.

6. HORST *v.* DE VILLIERS.

[1st February, 1838.]

Summons held Defective because the word "Provisional" was omitted before "Claim."

Horst
v. 14
De Villiers.

The Court held that they could not give provisional sentence in respect of a sentence of a Resident Magistrate, because the summons, although in all other respects proper for a provisional claim, omitted the word "provisional," and merely called on defendant to appear and "plead to the claim."

The plaintiff was allowed to withdraw the case, on paying to defendant the costs of *comparuit*.

7. VAN DEN BERG *v.* W. J. VAN DYK AND E. VAN DYK.

[30th November, 1838.]

Summons for Civil Imprisonment held Bad for Misjoinder.

Van den Berg
v.
W. J. Van Dyk
and
E. Van Dyk.

The Court found that a summons for decree of civil imprisonment against two defendants, founded on two separate judgments, respectively obtained against each for the same debt, but in separate actions, was bad in respect of the misjoinder; and it was withdrawn.

8. HUDSON *v.* COZENS.

[12th October, 1846.]

When a Capacity appended to the Plaintiff's Name in a Summons is merely Descriptive.

Hudson
v.
Cozens.

John Reid Cozens was summoned by Thomas Hudson, assistant cashier of the Cape of Good Hope Bank, "for the payment of a sum of £110 15s., upon a promissory note, dated 5th May, 1846, made by one Isaac Chase, in favour of William Sunley, or order, and by the latter and said John Reid Cozens indorsed in blank, whereof the said Thomas Hudson is the legal holder."

Brand resisted the provisional claim, on the ground that Mr. Hudson was not qualified to sue, as the assistant cashier of the bank which had discounted the note.

The Court held that the words "assistant cashier of the Cape of Good Hope Bank" were merely descriptive, and did not imply that plaintiff sued in that capacity. Provisional sentence was granted.

SUMMONS AND ITS REQUISITES. 127

1. "INDUCIÆ" *—PERSONAL SERVICE IN CAPE TOWN ON
RESIDENT OUT OF CAPE TOWN.
2. — CLEAR DAYS.
3. — SUNDAY.
4. — PROCESS IN AID.
5. — PERSONAL SERVICE IN CAPE TOWN ON
RESIDENT IN STELLENBOSCH.

1. MUNNIK v. VAN EYK.

[31st March, 1831.]

A Defendant resident more than Twenty-five miles' Distance from Cape Town, but personally served in Cape Town, held not entitled to Eight Days under the 13th Rule.

De Wet objected that the defendant had not been duly summoned, in respect that he had not had eight days' notice, to which he was entitled, in consequence of his residence being situated more than twenty-five miles from Cape Town, notwithstanding that the service had been made upon him, personally, in Cape Town.

Munnik
v.
Van Eyk.

The Court, in respect of the 13th Rule, overruled the objection and gave provisional sentence.—(*Sed vide* Leeuwner v. Mechau, p. 129, *infra*—where the contrary was decided.)

2. LOTZ v. SAUNDERS & JOHNSTONE.

[28th February, 1833.]

The Induciae under 13th Rule must be so many Clear Days before the day prescribed for the Defendant's Appearance.

In this case, the summons had been served on the defendants, who live in Cape Town, at one o'clock p.m. of the 26th instant.

Lotz v.
Saunders &
Johnstone.

* Under Rule 13 of the Supreme Court.—This rule is, "In all cases where by law there can be no arrest of the defendant, a copy of the summons and of any document belonging thereto, shall be served either personally on the said defendant, or at his dwelling house, or place of abode, and left with him, or at his house or place of abode, at least forty-eight hours before the day therein prescribed for his appearance, —when such service shall take place in Cape Town, or within twenty-five miles thereof,—not less than eight days in the Stellenbosch District and in the Cape District, more than twenty-five miles from Cape Town; not less than fourteen days in Swellendam and Worcester; twenty-eight days in Clanwilliam and George; and forty-two days in Uitenhage, Albany, Graaf-Reinet, Somerset, and Beaufort."—*Published 2d March, 1829.*

Lotz
v.
Saunders &
Johnstone.

The cause was not called on till four o'clock p.m. on this day. The defendants pleaded that they were entitled, by the 13th rule, to have forty-eight clear hours previously to the *day* prescribed for their appearance.

The Court were unanimously of the same opinion, and dismissed the summons with costs.

3. BLORE v. DREYER.

[2d December, 1833.]

Sunday is not excluded in calculating the Inducia.

Blore
v.
Dreyer.

Stadler, for the defendant, objected that the summons had not been served with sufficient *Inducia*, forty-eight hours being required; whereas here, the summons had been served on the evening of the 29th November, and, consequently, excluding the intervening Sunday, which ought to be excluded, forty-eight legal hours had not elapsed.

The objection was overruled, it being held that Sunday was not to be excluded.

He also objected that the defendant had been summoned to appear before the Court at ten o'clock this day, that he did appear, and found the Court not then sitting, and consequently was not liable to answer to the summons now.

Objection overruled.

Provisional sentence as prayed.

4. SNYDERS v. DE VILLIERS.

[31st May, 1836.]

Inducia in Service of Process of the Supreme Court in Aid of a Circuit Court.

Snyders
v.
De Villiers.

De Villiers, the defendant in this case, had, on the 14th April, 1834, obtained a provisional sentence against Snyders, the present plaintiff, in his absence, from the Circuit Court of Beaufort.

Thereafter, the plaintiff instituted the present action, under the provisions of Rule 181, in the Circuit Court of Beaufort, to have the said provisional sentence set aside, on the ground that the summons on which it proceeded had not been duly served on him or come to his knowledge, until after sentence had been given on it.

In consequence of the present defendant living in Stellenbosch, out of the jurisdiction of the Circuit Court of Beaufort,

the plaintiff obtained, under the provisions of Rule 188, the process of the Supreme Court in aid, in virtue of which the summons was issued on the present defendant in Stellenbosch, thirty-four days before the sitting of the Circuit Court at Beaufort.

Snyders
v.
De Villiers.

The defendant appeared at that Court, and objected that the *induciae* of thirty-four days was insufficient; whereupon the cause was removed to the Supreme Court.

This day, Cloete, for the defendant, maintained that the *induciae* of thirty-four days was insufficient for the due service of the summons in aid, as he resided in Stellenbosch,—that the 168th Rule of Court clearly did not apply to the service of process in aid,—and that the *induciae* in such cases must be calculated according to the provisions of the 13th Rule of Court.

Brand, *contra*, maintained that the 13th Rule did not apply to the service of process in aid, and that in this case *induciae* of thirty-four days was reasonable, and therefore sufficient.

The Court held that no Rule had yet been made which applied to the present case, and therefore that the Court must decide the question as to the sufficiency of the *induciae* by determining whether the *induciae* of thirty-four days had been reasonable; which they held it had been, and therefore overruled the objection.

5. LEEUWNER v. MECHAU.

[20th May, 1847.]

Personal Service in Cape Town on a Defendant resident in the Stellenbosch Division does not take away his Right to Eight Days' Induciae.

In the summons the defendant was described as of Stellenbosch, and, in point of fact, his place of abode was in the town of Stellenbosch; and he was summoned to appear on the 20th of May, while the date of the summons was the 15th of May.

The sheriff's return set forth that he had served the summons on the defendant personally on the 15th May, without stating where the service was so made; but it was admitted by both parties to have been made in Cape Town, to which the defendant had come from Stellenbosch for some temporary purpose.

The Attorney-General, for the defendant, objected that by the 13th Rule of Court, he, as domiciled in Stellenbosch was entitled to eight days' *induciae*, whereas he had only had *induciae* of four clear days.

Brand, for the plaintiff, maintained that as the service had been made personally on the defendant in Cape Town, he was, by Rule 13, entitled only to forty-eight hours' *induciae*.

Leeuwner
v.
Mechau.

Leeuwner
v.
Mechau.

The Court held that the summons was inept, in respect that while it described the defendant as domiciled at Stellenbosch, it commanded him to appear in court on the fifth day after its date, contrary to the provisions of the 13th Rule; and on that ground dismissed the summons.

The Court were inclined to hold that, although service may legally be made personally in Cape Town on a defendant found temporarily there, but whose actual domicile is in Stellenbosch, yet that such service can only have the same effect as if it had actually been served on the defendant personally in Stellenbosch, and therefore cannot deprive him of his right to the full *induciae* provided by the 13th Rule with respect to Stellenbosch.



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| 1. | SERVICE OF SUMMONS*—ON DEFENDANT'S NEIGHBOUR. |
| 2. | RESIDENCE OF DEFENDANT. |
| 3. | AT USUAL ABODE. |
| 4. | ON DEFENDANT'S NEAREST NEIGHBOUR. |
| 5. | PARTNERSHIP. |
| 6. | WAIVER OF BAD SERVICE. |
| 7. | NEIGHBOUR. |
| 8. | AFFIXING COPY TO THE DOOR OF THE DWELLING HOUSE. |
| 9. | PARTNERSHIP. |
| 10. | DITTO.—SERVICE IMPEACHED. |
| 11. | ON DEBTOR IN GAOL. |
| 12. | UNINTELLIGIBLE RETURN. |
| 13. | USUAL PLACE OF ABODE. |
| 14. | AFTER NINE P.M. |

1. MEYER v. MARAIS.

[28th September, 1830.]

Service in the Defendant's Absence on his Neighbour is Bad.

Meyer
v.
Maraïs.

In this case, the sheriff's return set forth—

"I have this day repaired to the farm of the above defendant, situate in this district, field-cornetcy of Winterhoek

[* This section applies to all other summary cases, as well as to those in which provisional sentence is claimed.—ED.]

and have served the accompanying summons, &c., in his absence, upon J. Viljoen, his neighbour, and have requested him to deliver, on the defendant's return, the documents aforesaid."

Meyer
v.
Marais.

The Court held this not to be legal and sufficient service, and the case was withdrawn.

2. SIMPSON & Co. v. ALLINGHAM.

[30th December, 1834.]

What does not amount to Proof of Residence for the Purpose of Service of Summons.

The plaintiff, to prove that the defendant lodged at Jearey's, where the summons had been left for him, called—

Edward Broderidge, who stated, I am barman of John Jearey, at Rogge Bay. I know defendant. He used to come to Jearey's; he did not lodge there. I received a summons afterwards, which I gave to Allingham. I don't know the name of the person who gave it me. I believe him to be a messenger. I got the summons on Saturday week. I gave it to Allingham the same day. Defendant has slept at Jearey's occasionally, not constantly.

Simpson & Co.
v.
Allingham.

The Court held that this evidence did not prove the residence, and adhering to the letter of the 13th Rule, dismissed the case, with costs.

3. TRUTER & MEESER v. MECHAU.

[1st February, 1836.]

Service at the "Usual and Last Dwelling-place" held Good.

In this case, the return by the sheriff of the service of the summons for provisional sentence, was in the following terms:—

"As I could not find J. G. Mechau or any one of his household at his usual place of residence in this town, and as his present place of residence is unknown to me, a copy of the summons and copies of the documents alluded to therein were left at his usual and last dwelling-place in this town—those documents having been affixed to the door of his dwelling place aforesaid—on this the 21st day of January, 1836."

Truter &
Meeser
v.
Mechau.

The Court (Chief Justice *dubitante*) sustained the service, and gave provisional sentence.—(*Vide infra*—Townley v. Cameron, p. 134. Wood v. Boardman, p. 137.)

4. SNYDERS *v.* DE VILLIERS.

[31st May, 1836.]

Service in the Country on the Defendant's nearest Neighbour held Bad.

Snyders
v.
De Villiers.

The plaintiff had instituted this action under the provisions of Rule No. 181, to have a provisional sentence which the defendant had obtained against him in the Circuit Court of Beaufort set aside, in respect that the summons on which it had been given had not been duly served on him, and had never come to his knowledge until after the sentence had been given and the amount thereof levied by execution on his property.

The sheriff's return of the service of the summons was as follows:—

"I repaired to the defendant's (G. C. Snyders') place, called 'Noots Kraal,' and on finding no person there, left the summons and papers with D. S. Fourie, Field-cornet, the defendant's nearest neighbour, who informed me that Snyders had gone over the Orange River, migrating with his cattle."

The Court held that this was not due service of the summons.

5. Vos *v.* Vos & Co.

[29th Feb., 1836.]

Service at the Place of Business of a Partnership, Sufficient as against the Partnership, but not as against a Partner individually.

Vos
v.
Vos & Co.

In this case, the summons was personally served on J. N. Vos, and served on the other two partners merely by leaving copies of the summons at the place of business of the firm.

Hiddingh, for J. N. Vos, confessed the debt.

No appearance was made for Lambert Vos.

Brand appeared for H. Vos, jun., and objected, first, that the firm had been dissolved before the summons was served, and, therefore, that it had no place of business, and called

W. Godfried Vos, who deposed,—I was a clerk to the firm of Vos & Co. to the end. The firm still exists, but it is going to be dissolved.

Brand then objected that no judgment could be given against H. Vos, jun., personally, as there had been no valid service against him, the summons not having been served on him personally, or left at his dwelling-house.

The Court gave judgment against J. N. Vos, provisional sentence against Lambert Vos, and against the firm, and dismissed the case as against H. Vos, jun.

6. IN RE HARTOGH.

[31st August, 1836.]

What constitutes a Waiver of Bad Service.

This was an application, at the instance of certain of their next of kin, to have Daniel Hartogh and Paul Johannes Hartogh, brothers, declared of unsound mind, and a curator appointed to their persons and estates. In Re Hartogh.

In this case, the return on the summons was as follows:—

“The within summons has been duly served on the 22d August, 1836,—1st., by indisposition of Daniel Hartogh and Paulus Johannes Hartogh, to their step-father, P. G. Niehaus, Paarl, the original summons shown to him, and his answer was, ‘If they are well, I shall bring them to Cape Town, and they will there attend. 2d.—To Albertus Philippus Hiebner, personally; the original summons shown to him, and his answer was, ‘I shall attend.’

“O. M. BERGH, Deputy Sheriff.”

The service of the summons was clearly insufficient and irregular, as not having been made as required by the 13th Rule; but as Hiebner, the *curator ad litem*, appeared in court, and made no objection to the service, the Court held that *he* waived it; and as both D. and P. J. Hartogh appeared in court, and made no objection to the service, the Court held that if they were sane, *they* waived the objection, and if insane, that their curator *ad litem* had effectually waived it for them.

7. LECKIE BROTHERS & CO. v. FARMER.

[2d November, 1840.]

Service on a Next-door Neighbour, the Defendant's House being locked, is Bad.

In this case, the return of service on the defendant, who did not appear, was—

“I repaired to the residence of the above-named Henry Farmer, and finding the door locked, I served a copy of said summons upon Mr. Wilson, living next door, and received for answer, ‘I shall deliver the copies to him.’”

The Court (Chief Justice absent), in respect that the copy had not been left at the dwelling-house in terms of the 6th section of Ordinance No. 37, held the service bad, and dismissed the summons.

It was not alleged that Mr. Wilson had delivered the copy so left with him to the defendant.

Leckie
Brothers & Co.
v.
Farmer.

8. TOWNLEY v. CAMERON.

[26th November, 1840.]

Service by affixing a Copy of the Summons on the Door of the Defendant's Dwelling-house, where, from the Return itself or from Evidence, it is made to appear to the Court Probable that the Copy had not reached the Defendant, is Bad: but where, neither from the Return itself nor from Evidence such Probability appears, such Service is Good.

Townley
v.
Cameron.

In this case, the plaintiff had claimed provisional sentence against the defendant, in the Circuit Court at George, on a summons, the return of which was as follows:—

"I have this day repaired to the dwelling-place of the within-named John Cameron, and not finding him at home, I have duly affixed a copy of the summons, &c., on the door of the dwelling-house of the said John Cameron."

The defendant did not appear.

It was proved to the satisfaction of the judge, by the deputy sheriff and the field-cornet, that the defendant had, with all his family and household, left this house (which was shut up) and gone to Cape Town, with cattle to sell, and that he had not returned to this house previously to the sitting of the Circuit Court.

The Circuit Judge (the Chief Justice) removed the case to the Supreme Court, in order to obtain the decision of the Court as to the sufficiency of the service.

This day, Cloete maintained that the service was sufficient, and quoted Merula, b. 4, c. 15.

The Court held, that in every case in which a summons was left at the defendant's dwelling-house, when neither the defendant nor any of the inmates were at the dwelling-house, and in which, from the circumstances stated in the return, or from evidence produced when a question as to the sufficiency of the service was raised, it was made to appear to the Court probable that the copy left had not reached the defendant, the Court ought not to sustain the sufficiency of the service in respect of the return, unless the plaintiff was able to satisfy the Court that the copy of the summons left had reached the defendant, which, in this case, they held he had not done; and, therefore, they held the service to have been insufficient, and dismissed the case.

Haupt
v.
Johnston.

But that, when there were no circumstances mentioned in the return, and no evidence produced by the defendant or others, to make it appear to the Court probable that the copy had not reached defendant, service made by leaving a copy of the summons, and affixing it on the door of the dwelling-house in the absence of the defendant and all the inmates, was sufficient service, and so they found in the case of Haupt v. Johnston.—(*Vide* Wood v. Boardman, p. 137.)

9. HAUPT v. SPAARMAN & PISTORIUS.

[30th November, 1840.]

Personal Service on One Partner of an alleged Partnership, not at the place of Business of the Firm, held to be no Service as against his alleged Partner.

Spaarman and Pistorius were summoned for provisional sentence on a note signed Spaarman & Co., as being co-partners and trading under the firm of Spaarman & Co.

Haupt
v.
Spaarman &
Pistorius.

The return of service was that the sheriff had served the summons on Spaarman personally. It did not state that copies had been left with him for the firm or for Pistorius. It did not state where Spaarman had been found, or that the sheriff had repaired to the place where the firm carried on business.

The Court held that whatever might have been the case, if the alleged partnership had been proved to exist, (which it had not, and could not be in the provisional claim,) that this was not sufficient service on Pistorius to warrant provisional sentence against him personally.

Spaarman acknowledged the debt, and judgment was given against him.

10. TERRINGTON v. SIMPSON.

[2d November, 1840.]

Service at the Counting-house of a Partnership Firm is not Service against One of the Partners individually.—Affidavit allowed to impeach the Sheriff's Return.

The summons in this case claimed provisional sentence against the defendant, therein designated as one of the partners of Simpson, Brothers & Co., in respect of a bill of exchange, drawn by the defendant on the said firm, and which had been duly protested for non-acceptance, and non-payment by the firm.

Terrington
v.
Simpson.

The Sheriff's return was: "I repaired to the counting-house of the firm of Simpson, Brothers & Co., which forms part of the residence of the defendant, and was there informed that defendant had left the colony. At the request of plaintiff's attorney, I have left a copy of the said summons at the said counting-house. "J. STEUART, H. S."

Musgrave objected to the sufficiency of this summons, and produced an affidavit by T. G. Simpson, a partner of the

Terrington
v.
Simpson.

firm, that the dwelling-house in question had been occupied by him and one Jones from 1st January, 1839, and the rent thereof paid by them, and not by the firm. That the business of the firm is carried on in a counting-house, which heretofore formed part of the said dwelling-house, and a store adjoining the counting-house, the usual entrance to said counting-house being through said store, but that there is a private communication between the counting-house and dwelling-house. That the rent of the said counting-house and store has, since 1st July, 1839, been paid by the firm. That defendant has not since then resided in said house, except that between 15th April and 17th August last past he boarded and lodged in it as a guest of deponent and Jones, and during that time had no furniture or goods in the said house except his personal baggage, which he took with him when he left Cape Town in August last. That for the last ten years defendant has principally resided in London; and on leaving Cape Town informed deponent he intended to proceed to some parts eastward of the Cape, and thence to England overland, and that he did not intend to return to the Cape.

The Court (Chief Justice absent) held that, if the house could have been held in law to have been the dwelling-house or place of abode of the defendant, the service at the counting-house, which was in fact a room within the said house, would have been good service; but that, under the circumstances set out in the affidavit, it could not be considered the dwelling-house or place of abode of defendant, so as to make it his *domicilium citandi*; and therefore the service was bad and insufficient.

11. LANDSBERG v. HENDRIKS.

[31st August, 1840.]

Personal Service on a Debtor confined in Gaol is Good.

Landsberg
v.
Hendriks.

The return by the sheriff of the service of the summons (for provisional sentence on a promissory note) in this case was: "I served the annexed summons upon the abovenamed defendant personally, and I delivered him a copy thereof, &c., and I received for answer, 'I cannot appear, I am in gaol.'"

(Signed) "J. STEUART, High Sheriff."

No appearance was made for the defendant.

The Court held that, even if the defendant be confined in gaol, that circumstance *per se* was no bar to provisional sentence being given against him in his absence; and gave provisional sentence, as prayed.

12. FULLER v. PHILLIPS.

[12th July, 1843.]

The Sheriff's Return held Unintelligible.

In this case, the defendant did not appear.

The sheriff's return was in these terms :—

"Fuller v. Phillips.—I have on this the 30th day of May, 1843, duly repaired to the residence of the above defendant; and not finding him at home, I pasted a copy of the summons, and of the document therein mentioned, in front of *the house of his door*.

"C. MOLLER, Deputy Sheriff."

The Court held that this return, as it stood, was unintelligible, and, therefore, that they could not proceed with the case, having at present no evidence of due service of the summons on defendant. The Court therefore, *hoc statu*, refused provisional sentence; leaving it to plaintiff, if he could, to procure an amended return showing due service, or to take such other steps in the cause as he competently could. The Court,—although they were of opinion that the return, even if it had not contained the blunder at the end, which rendered it unintelligible, did not set out all the circumstances specified in the 6th section of Ordinance No. 37, as being necessary to authorize the sheriff to leave a copy of the summons at the dwelling-house of the defendant,—did not give any decision as to whether, on this account alone, the return would have been insufficient.

Fuller
v.
Phillips.

13. WOOD v. BOARDMAN.

[22d February, 1844.]

Due Service of Summons by Posting the same on the Door of the Defendant's Dwelling-house, after Diligent Search.—What will not impeach the Sheriff's Return.

In this case, the Sheriff's return of service was as follows :—
[N.B. In the summons, the defendant was designated "of Graham's Town."]

"I have made diligent search for the defendant, but not being able to find him or any of his household at his usual place of abode, I have served the annexed summons by posting a copy of the same, and a copy of the promissory note, on the door of the dwelling-house of the said defendant, this 9th day of January, 1844.

(Signed) "F. CARLISLE, Deputy Sheriff."

Defendant did not appear, but Ebdon, at the instance of his friends on his behalf, objected to the sufficiency of the service of the summons.

Wood
v.
Boardman.

Wood
v.
Boardman.

After argument, the Court (the Chief Justice *dubitante*) held that posting the summons on the door of the dwelling-house was, under the circumstances set forth in the sheriff's return, due service in terms of the 13th rule of Court.—(*Vide* § 6 of Ordinance No. 37.)

Ebden next objected that the house, on the door of which the summons had been posted, was not the dwelling-house of the defendant, and in support of his averment produced the following affidavit:—

“Richard Roberts, of Graham's Town, maketh oath and saith, that the defendant hath no domicile in Graham's Town, and that his domicile, if he have any, is in Somerset, his wife and family now residing there. That the said defendant is now on a trading journey in the interior, beyond the boundary of the colony, as this deponent hath been informed and verily believes; and that the defendant hath a good defence to this action on the merits, as this deponent hath been informed and believes.”

And contended, that if this affidavit was not sufficient to disprove the statement made by the sheriff on his return, that the house at which he had left the summons was the dwelling-house of defendant,—still it threw such doubt on the correctness of the statement in the return as made it incumbent on the Court, before sustaining the return as proof of due service, to require the sheriff to explain the ground on which he alleged that the house at which he had left the summons was truly the dwelling-house of the defendant.

The Court, without giving any decision on the question as to whether, under any circumstances, it was competent to contradict or rebut the return made by the sheriff, held that this affidavit was not sufficient either to disprove the statement in the return or to make it necessary for the Court to call on the sheriff to explain the grounds on which he had made the return. The Court therefore sustained the service as having been duly made, and gave provisional sentence against defendant, as prayed, with costs.—(*Vide* Truter & Meeser v. Mechau, p. 131, and Townley v. Cameron, p. 134.)

14. SUNLEY'S TRUSTEES v. LEIBBRANDT.

[13th July, 1846.]

Service of Summons held Good after 9 o'clock p.m.

Sunley's
Trustees v.
Leibbrandt.

The Court held that it was no objection to the service of a summons in an action that it was served personally on the defendant, at his dwelling-house, at a quarter-past 9 p.m.

1. SUMMONS BY EDICT—"INTENDIT." *
2. ——— SERVICE.

1. BERGH, TRUSTEE OF STOLL, v. HOPE.

[31st August, 1835.]

AND

BERGH, TRUSTEE OF STOLL, v. MUNRO.

[28th February, 1837.]

It is Doubtful whether Provisional Sentence can be granted after an Edictal Summons, if there be no Proof that the same had come to the Defendant's Notice.

In this case, the Court gave provisional sentence against the defendant in his absence, he having been edictally summoned four times, and made default each time. In the first summons, he had been summoned to acknowledge or deny his signature and qualifications of Agent affixed to the said bond, or the validity of the said debt, and to plead to the provisional claim; and on his making default to that summons, the first default, with the profit thereof, had been granted to the plaintiff.

In the subsequent summons, he had only been summoned to appear and purge his default; and further, to hear such claim and conclusion as the plaintiff shall think fit and proper to make.

In this case, the attention of the Court was not called to the question as to whether provisional judgment could be given without filing an *intendit*.

But in a subsequent case, at the instance of the same plaintiff, where the defendant had been edictally summoned, and had made defaults, the profits of which had been granted to the plaintiff, precisely as in the preceding case against Hope, the Court doubted their power to grant provisional sentence in such a case, and the Attorney-General therefore withdrew his motion for provisional sentence, in order that he might file an *intendit*.

After which, it would remain open for him to contend that by reason of the profit of the first default awarded to the plaintiff, the signature of the defendant to the document sued on must be held as proved or acknowledged by the defendant.

Thereafter, the Attorney-General having duly filed his *intendit*, and put down the cause for trial, and at the trial put in the bond sued on, the Court, without further evidence, gave judgment for the plaintiff, as prayed, with costs, and declared the property mortgaged executable.

[* *Vide Van der Linden Inst.*, b. 3, pt. I, c. 2, § 9, pp. 404-5; and § 13, p. 410.—*Ord. van den Hove*, 10th September, 1732.]

2. DUNELL & STANBRIDGE v. VAN DER PLANK.

[29th February, 1840.]

Provisional Sentence after an Edictal Citation, on Proof by Affidavit that the same had come to the Defendant's Knowledge.

Dunell &
Stanbridge
v.
Van der Plank.

Defendant did not appear.

This was a claim for provisional sentence on a summons which had been served edictally, in consequence of the defendant being resident at Port Natal.

The plaintiff proved the publication of the edictal summons in the *Gazette*, and produced an affidavit by the master of the brig *Mary*, who deposed that on the 9th January, on board the *Mary*, in the harbour of Port Natal, he had delivered to the defendant a copy of the *Gazette*, containing the said edictal summons, which he had pointed out to the defendant, who thereupon stated that he knew all about it, as he had received accounts of it previously by another ship.

The Court gave provisional sentence, as prayed, in this and two other similar cases against the defendant.

A schooner, the property of the defendant, had, previously to the issuing of the edictal summons, been arrested *jurisdictionis fundandæ causâ*, and the arrest was put in by the plaintiff.

1. WARRANT OF ATTORNEY—BY ONE OF TWO TRUSTEES.

1. TRUSTEES OF DODDS, KING, & CO. v. WATSON.

[30th November, 1848.]

A Warrant of Attorney to sue, signed by One of Two Trustees "for Self and Co-Trustee," is not Sufficient to support a Summons for Provisional Sentence.

Trustees of
Dodds, King
& Co.
v.
Watson.

Against the plaintiffs' claim for provisional sentence, the Attorney-General, for the defendant, objected that the power of attorney authorizing the attorneys in this case to sue the defendant, was signed by one only of the two trustees, viz., by one Kay; and that his assertion, annexed to the signature, that he signed "for self and co-trustee," was not sufficient to obviate the objection.

After hearing Ebdon, *contra*—

The Court sustained the objection, and dismissed the case, with costs.

BOOK II.

MARRIAGE AND ITS INCIDENTS.

CHAP. I.—PROMISE OF MARRIAGE.

II.—ANTE-NUPTIAL CONTRACT.

III.—LEGAL CONSEQUENCES OF MARRIAGE.

IV.—SEPARATION “A MENSA ET THORO.”

V.—DIVORCE.

PREFATORY REMARKS

ON THE

CASES RELATING TO MARRIAGE.

§ 1. Perfect legal rights can be attained by such persons only as are born in lawful wedlock; and the most important powers as to person and property are lost and acquired by those who enter into the matrimonial state. It is therefore deemed expedient in systematically arranging the Decisions of the Supreme Court (the first book having been devoted to provisional cases, as exemplifying a peculiar but very interesting portion of the doctrines of the Roman-Dutch Law), to select for the second book the cases relating to marriage and its consequences.

§ 2. By marriage it is understood, in a legal sense, the union and cohabitation of one man with one woman until the death of the first dying, with the intention of having and rearing legitimate offspring. The contract of marriage has this in common with consensual contracts generally, that it is created by consent of the parties, testified and confirmed by certain solemnities required by law: but it differs from them in the essential particular, that it can never be dissolved by such consent. Persons entering into this state individually contract with each other, and jointly contract with society; and society alone has the power, on fixed principles of justice and policy, of dissolving the contract, before the period of its natural dissolution by the death of either of the consorts.

§ 3. The persons incapable of contracting legal marriage with each other are all relatives in the ascending or descending line, and collaterals within the fourth degree,—both of consanguinity and affinity. Those who have not attained the age of puberty may not marry; nor those who are in a state of undissolved marriage. The disability further includes persons who by reason of mental infirmity are incapable of giving legal consent; and those who by reason of incurable bodily infirmity are incapable of becoming parents. The marriage of minors without the consent of their parents was

prohibited under a penalty by the Placaat of Charles V. (A°. 1540, art. 17); and by the Political Ordinance of 1580, art. 3 and 13, was declared absolutely void, and this consent could be withheld without the power of interference by any tribunal;* but by the 17th section of the Order in Council of September, 1838, which is at present the marriage law of this colony, when such consent is withheld application may be made by petition to the Chief Justice, and in case the Chief Justice, after examination, shall declare by his order that the marriage is proper and may be forthwith solemnized, a marriage solemnized in pursuance of such order shall be as good, valid, and effectual as if the required consent had been duly given.

§ 4. Under the Dutch Law the espousals or *trouwbeloften* (*sponsalia*), attended anciently with considerable solemnity, but more recently requiring none, gave a right of action for the due impletion of the contract and solemnization of the marriage against the recusant party. But this action has been abolished by the 19th and 20th sections of the Order in Council above referred to, and an action for damages is the sole remedy in the case of a breach of promise.† The modes in which the publication of banns is to take place, the marriage to be celebrated, &c., are regulated by the sections (1 to 16) of the same Order in Council.

§ 5. Marriage lawfully contracted by the Dutch-Roman Law, and not preceded by an ante-nuptial contract, creates a partnership between husband and wife, under the sole administration of the husband, in all property, moveable and immoveable, belonging to either of them before the marriage, or coming to either during the marriage, until the date of its dissolution. The idea of separate property is entirely excluded, and a perfect community exists. The wife's position is assimilated to that of a minor, her husband being her guardian: she cannot sue or be sued,—she cannot contract, except on the principles on which minors are sometimes permitted to contract.‡ But the husband's power over the property brought by his wife into the community is far greater than that of a guardian over the property of his ward: as the sole administrator of all, both his and hers, he may, *stante matrimonio*, alienate and encumber at will, without her consent, all property, moveable and immoveable, vested in her before the marriage, or which she may have acquired during the marriage, in like manner as he may encumber or alienate

* Voet 23: 2, 11, 12.

† Harding's Ord., vol. 3, p. 28.

‡ A married woman, however, being a public trader may be bound *ex contractu*.

what had belonged to him before the marriage, or had come to him during its subsistence. In effect, the partnership is carried on in the sole name and under the sole control of the husband.

§ 6. On the dissolution of the marriage by the death of either of the spouses, after the payment of the liabilities of the common estate,—the partnership being dissolved,—the survivor, whether husband or wife, has a right to one-half of the clear property of the community,—the other half being the portion of which the predeceased could by will dispose, or devolving on his or her heirs *ab intestato*. The survivor is entitled to this half in all cases, whether he or she may have brought all the property into the community, or no portion of it. If, on the death of the husband the liabilities of the community exceed the assets, the wife surviving him is liable for half of the deficiency.

§ 7. This community, existing by the general law, may, however, be modified, or altogether excluded, by ante-nuptial contract; in which parties entering into the nuptial state are at liberty to prescribe the rules by which they desire, as between themselves, that their property shall be governed: provided only that the conditions be not against the nature of marriage. Entire separation of property may be stipulated,—administration by the husband of the wife's property may be forbidden,—settlements may be made,—successorial pacts may be entered into,—community of profit and loss may be excluded, or it may be left in the choice of the wife and her heirs to claim such community or not; in fine, all legal conditions may be inserted in an ante-nuptial contract, and none of these conditions can be altered or revoked during marriage, even by mutual consent, as such change or revocation would have the effect of a *donatio inter virum et uxorem*, which is expressly prohibited in our law. Conditions by which the marital power is given to the wife,—by which, contrary to law, it is stipulated that husband and wife shall be entitled to make donations to each other, &c., are void.* It must be remembered that whatever is not specially excepted in an ante-nuptial contract follows the law of community.

§ 8. Ante-nuptial contracts should be notari ally executed, as notarial deeds only are entitled to registration, and registration is essential to give validity to the hypothec† which the wife has on the estate of her husband for her property out of community administered by him, and for other purposes of a like nature.

* Voet 23 : 4, 20.

† General Janssens' Procl., 13th May, 1805.

§ 9. Before entering into a second marriage, parents who have in their possession or under their control any amount of inheritance, to which the children of the first marriage may be entitled, as coming to them from the predeceased parent, are bound to secure such portion by a deed called "*kinderbewys*;" which deed is to be duly registered, and is entitled to preference in the estate of the surviving parent. Where the surviving parent has not duly passed the deed of *kinderbewys*, minor children, whose portion from a deceased parent has been left in the hands of the survivor, have a tacit hypothec on the survivor's estate.

§ 10. Second marriages, *i.e.*, those contracted by one of the consorts after the death of the other, are subject to this penalty, adopted from the Roman into the Dutch Law, that, if there be any children of the first marriage, the parent may not by last will bequeath to his or her second wife or husband, as inheritance or legacy, any amount more than the least portion which he or she bequeaths to any one of the children of the prior marriage.*

§ 11. Separation *à mensâ et thoro*, whereby cohabitation temporarily ceases, the marital power is suspended, a division of the property in cases of community made, &c., may be granted by the Court when it is made clearly to appear that by reason of continued violence or cruelty, or other causes of a like nature, further cohabitation has become dangerous and insupportable to one or other of the consorts. This decree is, however, not lightly given; and on a reconciliation being effected, the former marriage *status* entirely revives. Deeds of separation, not by the authority of the Court, are binding as between the married persons themselves, but have no effect whatever with regard to creditors or other third parties.

§ 12. Divorce, by which marriage is dissolved anterior to its proper period of dissolution by death, is granted, after careful investigation by the Court into the truth of the allegations, on two grounds on adultery and malicious desertion. These are the sole which the State, on behalf of society, on the application of the injured husband or wife, will interfere to declare otherwise indissoluble contract of marriage capable of dissolution. Adultery cannot be admitted by the husband or wife accused of it; but the truth or falsehood of the accusation must be thoroughly investigated by the Court: and the Court will examine also whether the complainant comes before them in a sufficiently clear position to entitle him or her to the relief sought.

* Cod. L. 5, t. 8, l. 6.

On proof of malicious desertion, a judgment of divorce is not immediately given, but a decree for the restitution of conjugal rights is first granted; and it is only after disobedience to this decree that a divorce is pronounced.

§ 13. Those who may desire to fill up this meagre outline are referred to Voet, L. 23, tt. 1-4; and L. 24, tt. 1-3; Van Leeuwen, Cens. For., pt. 1, b. 1, c. 11-16: Grotius Introd., b. 1, c. 5; Van der Linden's Inst., b. 1, c. 3; Van der Keessel, Thes. 47-101; Brouwer de Jure Connubiorum *passim*; Cos, Regtsgeleerde Verhandelingen over de Boedelmenging; &c., &c.

BOOK II.

MARRIAGE AND ITS INCIDENTS.

CHAPTER I.

PROMISE OF MARRIAGE.*

1. DECREE TO MARRY.
 2. PROMISE BY MINOR.
 3. PROMISE BY MINOR, "SUBSEQUENTE COPULA."
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1. JOOSTEN *v.* GROBBELAAR.

[12th June, 1832.]

Decree to Marry given in respect of a Promise "subsequente copulâ."

The declaration set forth that the defendant did, at divers times in the year 1831, pay his addresses to the plaintiff, and strongly urge her to consent to enter into the holy state of matrimony with him, the defendant, to which she at length, in the month of November, 1831, consented.

Joosten
v.
Grobbelaar.

That the said defendant promised and engaged to intermarry with the said plaintiff at an early opportunity, and upon the faith of such promise and engagement had carnal knowledge of the plaintiff, in consequence of which she became pregnant by him, the said defendant.

That the said defendant, although repeatedly called upon to perform his aforesaid engagement, has hitherto refused and still doth refuse to enter into the holy state of matrimony with the said plaintiff.

Wherefore the plaintiff prays judgment of this Court, that the said defendant do forthwith enter into the holy state of matrimony with her, the said plaintiff, *in facie ecclesiæ*; and that such marriage be enregistered before the board for matrimonial cases at Worcester, with costs of suit.

* *Vide* Prefatory Remarks, § 4, respecting the abolition of the action to compel marriage.

Joosten
r.
Grobbeelaar.

The defendant in his plea admitted all the facts, as in the plaintiff's declaration set forth, to be true, "yet the said defendant saith that he is not bound by law to marry the said plaintiff as claimed by the said plaintiff, but that the said defendant is ready and willing to make such other compensation to the said plaintiff as to the Justices of our Lord the King shall appear reasonable and just,—and claims that the demand, as made by the plaintiff in Court, be rejected, with costs."

In her replication the plaintiff maintained that the defendant is bound by law to marry the said plaintiff, and that she, the said plaintiff, is not bound to accept any other compensation.

Brand, for the plaintiff, in support of the claim in the declaration and replication, quoted Van Leeuwen's Rom. Dutch Law, b. 4, c. 25; Van der Linden's Inst., b. 1, c. 16, § 4, p. 251; b. 1, c. 3, § 2, p. 73; Voet 23: 1, 12; 48; 5, 3; Wagenaar v. Richert, 13th June, 1822.

Cloete, for the defendant, in support of the plea, quoted Pothier on Contracts, § 157, and Van der Linden's note thereon, D. 42: 1, 13; D. 45: 1, 112, 113; Van der Keessel, Th. 512; Grotius Introd. 3: 3, § 41; Voet 19: 1, 14; Groenewegen Not. ad Grot. 3: 35, § 8.

Cur. Adv. Vult.

Postea, 26th June, 1832.—Judgment for plaintiff, marriage to be celebrated within a month from this date.

The Court were unanimous in favour of the plaintiff's claim in respect of the authorities quoted by her.

2. GRAY v. RYNHOUD, ASSISTED BY HER FATHER.

[1st March, 1832.]

A Promise of Marriage by an Unemancipated Minor is wholly Invalid.

Gray
v.
Rynhoud,
assisted by
her Father.

Cloete, for Gray, moved for an injunction prohibiting R. Rynhoud from contracting marriage with Eckermans until the determination in a suit to be instituted by Gray against R. Rynhoud, for breach of promise of marriage.

It was admitted that R. Rynhoud was a minor.

The Court discharged the application with costs, being of opinion that the applicant had failed to prove that the minor, Rynhoud, had made any promise of marriage with consent of her father, or that she had been so emancipated as to be able to make a valid promise of marriage without her father's consent.

3. GREEF v. VERREAUX.

[20th March, 1829.]

How far a Promise of Marriage by a Minor, "subsequente copulâ," is Valid.—In how far the Parent's Consent is necessary in such case.—A Foreign Instrument admitted as Proof of Age.

This action, in which the summons was served on the 28th November, 1828, was brought by the plaintiff, a minor, assisted by her father, as her guardian. The declaration alleged that the defendant had repeatedly in the months of March, April, and May, 1827, both verbally and in writing, promised to marry her, and by means of such promises had seduced her, in consequence of which she had been delivered, on the 18th February, 1828, of a daughter, of which the defendant was the father;—that she was thereby "injured beyond the possibility of relief by any mode whatsoever, save and except by the defendant's compliance with his aforesaid promise to marry her;" wherefore she prayed the Court to condemn the said defendant "to marry with her *in facie ecclesie aut coram judice*, according to the laws of this colony," &c., &c.

The defendant's plea set forth that he was a native of France, and had barely attained his twenty-first year;—that admitting that in March, 1827, the defendant subscribed certain letters addressed to the plaintiff *which may* have contained certain offers of marriage, that these letters were written in a language which the defendant did not understand; that the offers or promises therein contained were *entirely conditional* and dependent on the approval and consent of his parents and guardians, the defendant having then been, and still being, under age, and therefore requiring such a consent or approval to make any promise of marriage by him valid in law;—that the defendant never has obtained such a consent, and that a marriage with the plaintiff would be directly in opposition to the wish of his parents, consequently that any such promise is null and void, and the defendant not bound by it;—that having formally communicated to the plaintiff and her parents the dissent of his parents, this retractation of defendant's conditional promise was formally accepted and acted on by the plaintiff, who at that time and subsequently had been in habits of intimacy and courtship with other young men. Lastly, that no action having been instituted against the defendant for the defloration of the plaintiff and the expenses of delivery, he is not bound to answer to those averments in the declaration.

The plaintiff in her replication denied that the defendant was a minor, or that his parents had refused their consent, and

Greef
v.
Verreaux.

Greef
v.
Verreaux.

pleaded that having had carnal knowledge of plaintiff's person in consequence of his said promise, he cannot avail himself of his minority, or of the want of his parents' consent, even if such consent had been stipulated for in the promise, as a bar to the present action;—that the defendant did understand the meaning of the letters containing the promise;—that the plaintiff never accepted or acted on the defendant's retraction of his promise;—and that even if the terms of her letter to him, by which it is alleged that she accepted his retraction, could be so construed, such acceptance would be void and null, and not binding on her, as having been made without the consent of her parents and legal guardians.

At the trial, defendant abandoned the plea that he did not understand the language or meaning of his letters.

July 6, 1829.

The Court held that it was proved by the evidence of the witnesses adduced by both parties, that the defendant had made absolute and unconditional promises of marriage to the plaintiff, in writing, at the time alleged by her, and that by means of those promises he had seduced her and become the father of her child; that she had never, either by writing or by any act or conduct on her part, accepted or acted upon the defendant's retraction of his promise, or received the addresses of any other man.

The only questions therefore which remained to be decided were, 1st, whether the defendant had proved his minority. 2dly, what effect the defendant's minority, if proved, ought to have in the decision of this case.

In proof of his minority the defendant produced an *acte de naissance*, bearing to be an *extrait du registre des actes de naissance, de l'an 1807*, and to have been granted by the sworn principal registrar of the Tribunal of the 1st Instance, of the department of the Prefecture of the Seine, as keeper of the Records at Paris, on the 17th April, 1822, setting forth that on the 24th August, 1807, Jacques Philippe Verreaux, naturalist, presented before the *adjoind du maire* of the 12th *arrondissement* of Paris, a male infant, the child of himself and his wife, born on the preceding day, to whom he declared to give the name of *Pierre Jules*. Also, a passport, dated 4th April, 1826, bearing to be granted by the Prefect of Police, of the department of the Seine, to Mr. Verreaux (*Pierre Jules*), a naturalist, to proceed to Toulon, and thence to the Cape of Good Hope, in which it was stated that the bearer was of the age of 18 years.

This *acte de naissance* was exactly in the form prescribed by the Code Napoleon, and the French Consul swore that both the *acte de naissance* and the passport were in due form, and that he believed them to be genuine and authentic in every respect.

It was proved also by the evidence of one of the defendant's witnesses, that the defendant, soon after his arrival in this colony, and long before it was possible for him to have foreseen that this action would ever be instituted, had placed both the *acte de naissance* and the passport, now produced, under his, the witness's, charge, to be taken care of, as being the certificate of his birth and his passport. It was also proved by a witness who was well acquainted with the writing and signature of the defendant, that the signature required by the French authorities to be written on the margin of the passport by the person to whom it was granted, was, in his opinion, the signature of the defendant, and indeed it evidently appeared to the Court to be the same with the signatures to several of the documents produced, which had been proved and admitted to be the signature of the defendant.

Taking into consideration these circumstances and the facts that the names and profession inserted in the passport were the names and profession of the defendant,—that the passport bears to have been granted to its bearer *as departing for the Cape of Good Hope*, at the very time the defendant must have left France to come here, and that the age mentioned in the passport corresponds exactly with the *acte de naissance*;—the Court held that the defendant had produced such evidence that these two documents applied to him, and that his age was therein correctly stated, as to afford *prima facie* proof of his being under the age of 21 years in March, 1827, and consequently still under the age of 25 years, and if the plaintiff denied this, to throw the *onus probandi* the majority of the defendant, on the plaintiff. (*Vide Voet 4 : 4, 12.*)

The Court held that the question, whether the defendant by the promise of marriage which he is proved to have made to the plaintiff, and the *concubitus* which in consequence had taken place at a time when he was under the age of 25 years, had created such an obligation on him to marry the plaintiff as to entitle her to enforce performance of it by the judgment of this Court, was one which must be decided by the law of this colony, as the *lex loci contractus*, without reference to that of France, his *forum originis*;—that by the law of this colony the general rule is that no minor (which term until after the trial in this case had taken place, viz. : until the 20th June, 1829, when by the ordinance No. 62 the age of majority was declared to be 21 years, comprehended all persons under the age of 25 years), can legally marry without the consent of his parents and that all such marriages without such consent are *ipso jure* null and void (*vide Voet 23 : 2, 11; Brouwer, b. 1, c. 11, §§ 4, 5, 6.*) And that, as by the law of France, persons under the age of 25 are prohibited from marrying without the consent of their parents (*vide Code Napoleon,*

Greef
v.
Verreaux.

article 148), the question did not arise in this case whether a person, who in the country which was his *forum originis*, was deemed in law to be *sui juris* and competent to marry without consent of his parents, at an age less than that which by the law of this colony constitutes majority, was in so far as related to his capacity to contract marriage in this colony, to be deemed to be a minor, or a major and *sui juris* (*vide* Voet 4: 4, §§ 8, 9, 10); and that although it had been proved that the defendant by coming to this colony, with consent of his parents, to reside and carry on his trade and profession on his own account, has become to a certain extent emancipated from the *patria potestas*, yet that by the law of Holland and of this colony, contrary to the civil law, the marriage of such emancipated minors, while under 25 years, without consent of their parents is *ipso jure* null and void. (Voet 23: 2, 11; Brouwer, b. 1, c. 11, §§ 4, 5, 6.)

The Court held that as at the time when this action was brought for the purpose of compelling the defendant to marry the plaintiff, and, indeed, until after the pleadings had been closed and the trial had taken place, the defendant was still a minor,—and when as such he could not lawfully enter into any marriage without consent of his parents, and any such marriage would have been *ipso jure* null and void,—the sole object and conclusion of this action was, to have the defendant decreed by the judgment of this Court to do that which was illegal and which when done would be *ipso jure* null and void; consequently that this action was originally ill-founded, and could not now have effect given to it merely because it had happened that after this trial, but before judgment was given, the ordinance No. 62 had altered the law, and placed the defendant now in a state of majority.

On this ground the Court held that the defendant must be absolved from the instance in this action; but without costs.

The Court were very strongly inclined to be of opinion that if this action had been instituted against the defendant after he had become major, and when therefore he did not require the consent of his parents to render his marriage valid, and they were not entitled by law to interfere to stop it, that the defence of the defendant, which could then have been founded solely on his minority at the time the contract was entered into, and on his right to be restored against it as being injurious to him, would have been ill-founded, and must have been repelled, seeing that in consequence of and under the faith of that contract, made by him after he had been emancipated from the *patria potestas*, he had deflowered the plaintiff, a virgin of equal condition with himself, and in every respect suitable to be the wife of a person of his condition, and that he could not restore the plaintiff against the consequences which had

resulted to her from what had taken place under that contract, which restitution of the plaintiff ought to be made as a condition precedent to the right of the defendant to be himself restored against the effect of the contract (*vide* Brouwer 1, c. 13, §§ 15, 17; 1, c. 15, § 9); and the Court, therefore, reserved to the plaintiff, if she should be so advised, the right to institute a new action against the defendant now that he was major, to compel him to perform his promise of marriage.*

[But the case was not again brought before the Court.]

In addition to the authorities above mentioned, the defendant quoted Van der Linden, Inst., b. 1, c. 3, § 2, p. 71; Grotius' Introd., 1: 5, 15, and 2: 5, 8; Voet 23: 1, 17; Brouwer 1: 16, 18; Van Leeuwen, Cens. For., 1: 11, §§ 12, 13, 16; Bellum Juridicum, cas. 93; Dutch Consultations, vol. 3, No. 90.

Greef
v.
Verreaux.

* *Vide* section 4 of the Prefatory Remarks, p. 144, *supra*.

CHAPTER II.

ANTE-NUPTIAL CONTRACT.

1. FORMALLY EXECUTED AFTER MARRIAGE.
 2. APPOINTMENT OF TRUSTEES UNDER ANTE-NUPTIAL CONTRACT, NOT REVOCABLE AFTER MARRIAGE.
 3. ALLEGED HYPOTHEC ON TRUSTEE'S ESTATE.
 4. REGISTRY.
 5. FOREIGN.
 6. INVALID.
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1. TWENTYMAN AND ANOTHER v. HEWITT.

[28th February, 1833.]

Where three Trustees had been appointed under an Ante-nuptial Contract, containing certain Provisions for the benefit of the Wife and the Children of the Marriage,—which Ante-nuptial Contract was not entitled to Registration so as to secure the provided benefits, by reason of its not having been properly witnessed,—the Court on action brought by one of the Trustees, another intervening during the progress of the suit, subsequently to the Marriage, decreed that a formal Notarial Deed should be drawn up according to the Articles of the informal Ante-nuptial Contract, to the satisfaction of the Master of the Supreme Court. And the Court further decreed that thereupon the Husband should proceed to carry out the aforesaid Provisions.

POSTEA.—*The Husband having failed to carry out one of the Provisions of the Notarial Deed, which the Court had decreed to be executed, and in which the Trust had been accepted by one only of the three intended Trustees, the Court (by a majority) held that a Claim for Civil Imprisonment could be maintained by this one without his intended Co-trustees to enforce compliance with the terms of the Decree.*

Twentyman
and Another
v. Hewitt.

On the 25th March, 1829, the defendant executed an ante-nuptial contract, signed by himself, L. Twentyman, J. Chisholm, Mrs. Chisholm, the wife of the latter, the mother

of the defendant's wife, and A. Gray, in which *inter alia* it was agreed that the defendant should settle and assure to the issue of the intended marriage £2,000, and in pursuance thereof defendant bound himself to A. Gray, L. Twentyman, and J. Chisholm, the trustees appointed in said contract, in a sum of £1,000, that in case he should die before he should have invested the said £1,000 in manner after mentioned, that then his executors, &c., should, within three months after his death, pay to the said trustees the said sum of £1,000, or the balance thereof not so invested; and covenanted and agreed to invest £500 within three years, and £500 within five years from the date thereof, either at interest on good security, or in the purchase of real property in the names of the said trustees, for the purposes of the said trust.

Twentyman
and Another
v.
Hewitt.

In June, 1832, L. Twentyman, as one of the trustees appointed in the said contract, *by himself* brought an action against the defendant, and in his declaration alleged that the defendant had not invested £500 within three years in manner aforesaid; and that through mistake and ignorance of the parties the said contract was not witnessed or attested in such manner as is required by law to enable the trustees to enregister the same, whereby they were prevented from being preferred to concurrent creditors of the defendant upon the said contract for the said sum of £1,000, and prayed that the defendant should be decreed to invest or pay over to the trustees the said £500 in manner aforesaid, *and to execute all such notarial or other deeds as shall be sufficient and binding in law to carry into full force and effect the provisions, covenants, and trusts, agreed upon, provided, covenanted, and, created or intended to be provided, &c., &c., by the said ante-nuptial contract.*

The defendant in his plea (filed 6th July, 1832) denied the validity of the plaintiff's claim, both as to the investment or payment of the £500, and the execution of the notarial deed, and alleged that the said ante-nuptial contract, set forth in the declaration, was a mere rough draft of a deed of settlement, and a document which the several parties well knew at the time was utterly informal and invalid in itself, and that the plaintiff by the said document did not take upon himself, nor was he invested with any trust under the said deed, but that at the time of executing the same it was agreed upon and understood that the notary public, who attended at the signing of the said draft, was subsequently to draw out a more formal deed of settlement with several important alterations therein, and that the said notary public did, agreeably to such agreement or understanding, draw out a formal deed of settlement bearing the same date, which contains the true and full intent and meaning of the aforesaid draft, and that *inter alia*

Twentyman
and Another
v.
Hewitt.

by the said formal deed of settlement it is covenanted and agreed that if the defendant shall omit or fail to invest the said sum of £500, now demanded, within the period therein set forth, the defendant shall cause an insurance to be effected upon his life for £1,000; and it is also further stipulated that the plaintiff, together with A. Gray and J. Chisholm, should accept and take upon themselves the trust contained in the said deed of settlement. But that the plaintiff has failed to perform the engagement, by which the plaintiff would have been bound as trustee, and has refused to sign the said formal deed of settlement, and to take upon himself the trust, which thereby would have been confided to him, and that the plaintiff is therefore not entitled as yet to bring this action, and upon these grounds the defendant claimed to be absolved from the instance, with costs.

In this plea the defendant did not object to the title of the plaintiff to sue without the concurrence of Gray and Chisholm.

The replication commenced thus:—"The said plaintiff, L. Twentyman, and J. Chisholm, who intervenes as a plaintiff in this suit, by an order bearing date the 7th August, 1832, for replication, &c., say," &c., &c.

The plaintiffs then denied all the allegations in the plea, "And the said plaintiffs further say that the said A. Gray, in the said ante-nuptial contract mentioned as a co-trustee with the plaintiffs, is not within this colony, and therefore without the jurisdiction of this Court, and the plaintiffs pray that a day may be given to the said A. Gray, when he shall come within the jurisdiction, either to accept or to repudiate the said trust."

In his rejoinder the defendant maintained that he "is not barred from joining issue with the said plaintiffs by reason of any further prayer being made in the plaintiffs' replication for a day to be appointed to one A. Gray, to accept or repudiate the said trust, but that the said defendant persists in denying the right to sue being vested in the plaintiffs, in the manner as set forth in their declaration, and persists in his conclusion," &c., &c.

Sept. 27, 1832. After the cause had been heard, the Court (Menzies, J., absent on circuit) gave this judgment:—"The Court decree that a notarial deed be drawn up and extended from and according to the articles for and in respect of the ante-nuptial contract, produced in evidence before the Court, and that the said deed, when so duly prepared and approved of by the Master of the Court, be duly executed before the said Master within seven days thereafter, by the defendant and by the trustees accepting of and taking to the administration of the trusts under the said marriage settlement. And the Court further decree that within fourteen days from this date the

defendant do, subject to the approbation of the Master in that respect, and in pursuance of the said articles, lay out and invest the sum of £500, either at interest on good security, or in the purchase of real property, and that the defendant be adjudged to pay the plaintiffs their costs."

Twentyman
and Another
v.
Hewitt.

Thereafter the Master reported that the said notarial deed had been duly executed as decreed, by the defendant, Hewitt, and by John Chisholm, *one* of the trustees, accepting of and taking to the administration of the trusts under the said marriage settlement.—That the defendant, Hewitt, had failed to lay out and invest £500 on good security or in the purchase of real property as decreed, but that he had expended £500 in augmenting and improving a certain place called "Schoemaker's Gat," his property, but already mortgaged for £920, and that the further mortgage of £500 thereon, offered by the defendant, would not be good and sufficient security for the purposes mentioned to the said amount.

Oct. 9, 1832.

Thereafter a summons was taken out by the attorneys for the plaintiffs in the above cause, as at the instance of the said L. Twentyman and John Chisholm, against the defendant, commanding him "justly and without delay to lay out and invest the sum of £500, either at interest, &c., &c., &c., pursuant to and by virtue of a certain sentence of the said Supreme Court, bearing date 27th September, 1832, in a certain case pending in our said Court, between L. Twentyman and J. Chisholm, as plaintiffs, and the said H. Hewitt, as defendant; and also, &c., &c., &c., to render to the said L. Twentyman and J. Chisholm the sum of £49 7s. 10d., which he owes to them as and for the taxed costs and charges, &c., &c., and unless he shall do so, to shew cause, if any, against the claim which will then be made on behalf of the said L. Twentyman and J. Chisholm, for civil imprisonment against the person of him, the said H. Hewitt, until he shall have satisfied the said sentence," &c., &c.

Feb. 14, 1833.

Thereafter appearance was this day made, by counsel, for the plaintiffs, Twentyman and Chisholm, and also for the defendant.

Feb. 19, 1833.

The defendant alleged that A. Gray had never been within this colony, or in any way signified his acceptance or repudiation of the trust, since the 15th August, 1832, when the plaintiffs had filed their replication.

That the plaintiff, Twentyman, had left the colony, a short time before or after the decree of the Court had been given, on the 27th September, 1832, and had not yet, in terms of that decree, executed the notarial deed, as a trustee, accepting and taking to the administration of the trusts under the marriage settlement, and objected that until Twentyman and Gray had executed said deed, and accepted and taken to the

Twentyman
and Another
v.
Hewitt.

administration of said trusts, Chisholm, who was only one of the three trustees appointed, was not entitled to enforce performance of the decree of the 27th September, 1832, by obtaining decree of civil imprisonment against the defendant.

The Chief Justice held that this objection was good, on the ground that it was quite clear that under the notarial deed, Twentyman was to be a contracting party, that by it all the trustees are made liable for their several acts, and it is quite possible that Mr. Twentyman may have been considered as the most responsible trustee, and chiefly trusted to for duly enforcing it. By his not having yet executed the notarial deed and accepted the trust, the covenants have not yet been secured to the defendant in the manner contemplated, and until Mr. Twentyman shall have accepted or renounced the trust, the Court therefore cannot be called on to give decree of civil imprisonment for non-performance of acts under a deed not yet executed by all the persons intended to be parties to it.

Menzies, J., stated his regret that he could not come to the same decision; because whatever credit may be due to the trustees for well intended zeal, he could not give them credit for having acted with sound discretion, seeing the unfortunate predicament into which they had brought the defendant and his children, for whose interest they professed to be acting. By having insisted upon the defendant's doing what they knew it was not in his power to do, and refusing the only thing like an equivalent, which he had in his power to give, they were now seeking to throw the father of those children into prison, and so to force or enable him to surrender his estate as insolvent, and thus free himself from his present obligations to make a provision for his children, besides probably depriving him of the means of supporting and educating them properly in the meantime.

On the merits of the judgment of 27th September, 1832, he would give no opinion, as he had not been in Court at the time it was given. But on referring to the record in that case, he found that the action was originally brought by Mr. Twentyman alone, and was founded exclusively upon a deed, which, although it was not a notarial deed and therefore could not be registered, was one which was just as binding, and which a Court of law could as fully enforce to the extent to which it went. This deed did not provide that a majority of trustees appointed by it should be a quorum, or that one trustee should act without the other two,—all the covenants in that deed were between Hewitt, on the one part, and three gentlemen, therein appointed trustees, on the other part, and the deed was signed by all these three gentlemen. It was not open to him now to enquire whether one of the trustees

could, under that deed and without the consent of the other trustees, maintain an action having such conclusions as were contained in the declaration in that case, because the Court had found that one of the trustees could maintain an action for the implement of the deed, or, at least after Mr. John Chisholm had intervened on the 7th August, that two trustees could maintain an action on that deed. This could not be considered to have been decided *per incuriam*, for the absence of one of the trustees is in the replication expressly brought under the notice of the defendant and of the Court, who must be presumed to have read the pleadings; notwithstanding this fact, the Court gave the decree of the 27th September, 1832. Here therefore is a decision of this Court, which is now final and irreversible, that two only of the three trustees, appointed under the deed of March, 1829, all of whom had signed that deed, could maintain an action under that deed without the concurrence of the third trustee. The new notarial deed is the produce, the issue of the decree, by which the Court have found that two trustees were entitled to sue for performance of the contract of 25th March, 1829. It is admitted by the defendant that he has not performed the contract; but it is objected by him that one of the plaintiffs has not done what is required from him, and that Mr. L. Twentyman cannot at present insist for performance of the notarial deed, which he has not signed. But it is not in respect of that deed that the claim for civil imprisonment is made,—it is and must be founded solely on the judgment given for enforcing performance of the deed of March, 1829. Mr. Chisholm has done everything which is necessary or can be required to entitle him to enforce performance of what is decreed by that judgment; he has accepted and taken to the administration of the trust in terms of it, by signing the notarial deed. He had not been able to discover any principle in law that the performance of such a deed as the notarial deed, decreed to be executed by a judgment of the Court, is to be delayed for an indefinite period, until the other two trustees shall have had it tendered to them for their signature, and accepted or repudiated the trust. The children may well say we would rather have Mr. John Chisholm alone than nobody. The children have a much stronger interest that this trust property shall be under the guardianship of such one of those three gentlemen as shall accept, than that the trust shall remain in abeyance, and ineffectual, until they have secured the responsibility of all the three. If these three gentlemen had suddenly died, or had all refused to act, he doubted very much whether the Court would not have been bound to give effect to the prayer of the children to appoint a *curator ad litem* to enforce performance of the decree of 27th September, 1832. The judgment and

Twentyman
and Another
v.
Hewitt.

Twentyman
and Another
v.
Hewitt.

the notarial deed prove that the trust is created, and any party interested is therefore entitled to come to the Court to have the trust carried into effect.

On these grounds it appeared to him that the absence of Twentyman and Gray did not entitle Mr. Hewitt to maintain the defence pleaded by him in bar of the claim for civil imprisonment, and he regretted that the Court had no alternative but to grant a decree of civil imprisonment, for the performance of the decree and the payment of costs.

Kekewich, J., stated that he entirely concurred in the opinion expressed by Menzies, J., and dissented from that of the Chief Justice.

The Court (by a majority) granted decree of civil imprisonment, as prayed, but suspended its execution for one month, provided the defendant paid the £49 7s. 10d. costs claimed, passed a bond in favour of the trustees in his marriage contract for £500, payable on demand and mortgaging the whole of his real property, effected an insurance on his life for £500, and assigned the policy to the said trustees, and on his doing this, suspended the execution of the said decree, so long as the defendant should keep the said policy open by paying the premium thereon.

2. BUISSINNE AND ANOTHER v. MULDER ET UXOR.

[4th August, 1835.]

Where by the terms of an Ante-nuptial Contract it was stipulated that there should be Community of Property, subject to this exception however, that certain Property belonging to the Wife in her own right should be vested in Trustees, (appointed for that purpose, by a separate Deed of even date with the Ante-nuptial Contract,) as the sole and separate Property of the Wife, the Interest to be duly paid to her and the Property so vested to be not otherwise disposed of than by Last Will,—it was held by the Court that this appointment of Trustees for the above purposes could not be revoked by the Wife after Marriage, nor by the Husband and Wife jointly.

Buissinne
and Another
v.
Mulder et
Uxor.

Brink, Elliot, and Johanna Pezo, widow of Caffin, were the executors of the joint estate of Caffin and his said widow.

The widow Caffin, previous to her second marriage with Mulder, executed, in conjunction with him, an ante-nuptial contract, dated 17th June, 1835, by which they stipulated, "That from the day of the said intended marriage there shall be and exist between them a full and perfect partnership and

2. in 1835
[1835]
1034.

community of property in every respect, according to the laws and customs of this colony, subject however to the following exceptions, conditions, and limitations, that is to say,— That a principal sum of £3,000, together with a certain house and premises, situate No. 55, Dorp-street, Cape Town, being part of the property belonging to the second appearer in her own right, as widow and one of the heirs of the said J. Caffin, deceased, shall be, and the same is hereby excluded from all such partnership and community of property, and that the same shall be and remain vested in the hands of W. S. Buissinne and A. F. Carstens, trustees, for that purpose appointed by a separate deed, bearing date herewith, as the sole and separate property of the said second appearer;—and it is hereby resolved and agreed upon between the said parties, that the said Johanna Pezo (the widow), as the future spouse of the said M. J. Mulder, or her assigns, shall during her lifetime receive the hire of the said house, with the interest or dividends of the said sum of £3,000, from time to time, as the same shall become due, to be by her or them applied in such manner as she or they may think proper, and that the receipt of her, the said J. Pezo, or her assigns, alone shall be a sufficient discharge to the said trustees; and further, that in case the said J. Pezo shall depart this life in the lifetime of the said M. J. Mulder, then that the said house and premises, together with the sum of £1,500, shall become the sole and absolute property of the said M. J. Mulder;—and lastly, that the said house and premises, and capital sum aforesaid, shall not be otherwise disposed of, except by mutual last will and testament.”

Buissinne
and Another
v.
Mulder et
Uxor.

On the same day the widow executed a notarial deed, by which she declared that, “Whereas,” (here the deed recited the foresaid provisions of the ante-nuptial contract,) &c., &c.; “Now these presents witness that, for the purpose of carrying the said settlement into effect, the appearer doth hereby nominate and appoint the said W. S. Buissinne and A. F. Carstens jointly to be her true and lawful attorneys and trustees irrevocable (during the present marriage), with full power and absolute authority in the premises for her and in her name to enter upon, stand seised, and be possessed of the said house and capital sum of £3000 upon trust, to hire, keep, lay out, and invest the same at interest on good and approved security, and to pay the said hire, interest, or dividends thereof, from time to time, as the same shall become due, unto the said J. Pezo or her assigns, during her lifetime, to be by her or her assigns applied in such manner as she or they shall think proper;—and in case the appearer shall depart this life in the lifetime of the said M. J. Mulder, then and upon further trust to transfer the said house and

Buissonne
and Another
v.
Mulder et
Uxor.

premises, and pay over the hire, as also one-half of the said sum of £3,000, or £1,500, with all interest due thereon, to the said M. J. Mulder, and in case of the death of either of the said trustees during the lifetime of the appearer, she doth hereby reserve to herself full power and absolute authority in the premises to nominate and appoint some other fit and proper person to be trustee in the room or place of the trustee, to be approved of by the surviving trustee, as also by the said M. J. Mulder."

The widow and Mr. Mulder married in July last, and on the 21st July the following letter was written to the trustees by Mr. and Mrs. Mulder :—

"Gentlemen,—On further mature consideration about our ante-nuptial contract, and the costs probably accompanying it, and taking into consideration that the administration of £3000, which have been kept out of community, and consisting in sufficiently secured bonds, is no difficult task for us, we have agreed, without wishing to place any the least distrust in your administration, to reserve that administration to ourselves, and consequently previously and kindly to thank and release you from the duty as trustees of the same, which you have voluntarily taken upon yourselves, of which a notarial act will be passed by both of us. We hope and trust that this step may not cause the least infringement on our friendship, having been taken with no other object than to secure to us a better subsistence, and in that expectation we subscribe ourselves

"Gentlemen, yours, &c.,

"M. J. MULDER.

"J. S. MULDER.

"A. CARSTENS, Esq., and

W. BUISSINNE, Esq., Cape Town."

And this day the trustees moved for an attachment, in the hands of the executors, of all sums belonging to the joint estate of Caffin and his widow, until the Court should decide on the validity of the trust deed, and of the effect of the alleged revocation.

The executors appeared and declared their willingness to consent to any order the Court might make, but stated that they had only in their hands a bond for £600, and were liable, as executors, for debts and legacies to a greater amount, and prayed that no order should be made, which would have the effect of preventing them from liquidating the estate under their administration. They also stated that the widow, having been a joint executrix, had all the rest of the property in her hands.

Brand, for Mr. and Mrs. Mulder, maintained that as the letter above quoted had effectually revoked the trust deed, or that as, at all events, Mrs. Mulder was entitled now to revoke the trust deed, she had a right to oppose the attachment, which he accordingly did.

Buissinne
and Another
v.
Mulder et
Uxor.

The Court held the trust deed to be in force, until set aside by the judgment of the Court, and therefore granted an interdict on the executors not to pay over, out of the joint estate of Caffin and his surviving widow, any sums in their hands belonging to Mrs. Mulder, to her, until a further order should be made by the Court. Costs to be respectively paid out of the estates under the administration of the respective parties.

Thereafter the said trustees brought an action against Mr. Nov. 12, 1835. and Mrs. Mulder, the defendants.

The declaration, in which, after setting forth the execution by Mr. and Mrs. Mulder of the ante-nuptial contract and the deed of trust, both dated 17th June, 1835, stated that the plaintiffs "did accept the said trust, and that the said J. Pezo agreed and engaged to deliver to the said plaintiffs the title deeds of the said house and premises, situate in Dorp-street, No. 55, in this Cape Town, as also mortgage bonds and other securities to the amount of the said sum of £3,000, to be by them administered and held in trust in the terms of the said last-mentioned deed. But that the said J. Pezo and her husband, Mulder, the other defendant, and each of them, have refused to deliver over to the plaintiffs, the title deeds of the said house and premises, and mortgage bonds or other securities, to the amount of the said sum of £3,000, as agreed upon by and between the said parties. Wherefore they prayed that they might be condemned to do so forthwith."

In their plea, the defendants pleaded "that the said Johanna Pezo was legally and lawfully entitled to cancel and revoke, and did cancel and revoke, the appointment and nomination of the said plaintiffs as her true and lawful attorneys and trustees, contained in the trust deed of 17th June, 1835, by a private letter to the said plaintiffs from the said defendant's said wife, dated 21st July, 1835, and also subsequently by a notarial deed, dated the 6th August, 1835, whereof the said plaintiff had due and legal notice."

Brand, for the defendants, maintained that the question was not whether Mrs. Mulder had, by the above documents, revoked, and could by any deed revoke, the ante-nuptial contract, but merely whether she had not or could not revoke the personal nomination of the plaintiffs, to be the trustees for carrying the ante-nuptial contract into effect. He maintained that she could, and had made the last-mentioned revocation. He admitted that the provision in the ante-nuptial

Buissinne
and Another
v.
Mulder et
Uxor.

contract, in so far as it reserved certain of the property of Johanna Pezo from the community of goods created by her marriage with Mulder, could not be revoked by her during the subsistence of the marriage.

Cloete, for the plaintiffs, argued *contra*, and quoted Voet 36: 1, § 9.

[*Cur. Adv. Vult.*]

Postea (17th November, 1835).—The Court gave judgment for the plaintiffs, as prayed, with costs,—being of opinion that Johanna Pezo, before her present marriage, and when she had the uncontrolled power over her property,—had effectually reserved the property to which this action relates from the *communio bonorum*, and created for this purpose the trust deed in question; that it was clear it was then her intention to create a trust, to subsist during the subsistence of the marriage, and that the legal effect of the deeds which she has executed, is to create a trust to subsist during the subsistence of the marriage; and that, having done so, she has not, during the subsistence of the marriage, power to revoke those deeds, or to annul the trust.

3. IN RE WRIGHT.

[12th Jan., 1842.]

Where an Amount settled on a Wife, then a Minor, by Ante-nuptial Contract, has not, in the terms of the Contract, been secured by Mortgage on Landed Property, but becomes merged in the Private Funds of one of the Trustees after the Wife's Majority, no tacit hypothec is created for such amount on the Insolvent Estate of such Trustee.

In re Wright. Cloete moved to have the liquidation account in this estate amended, by awarding preference to Mrs. Benningfield for the sum of £375, being the amount of a sum settled, as in trust for her, in her ante-nuptial contract, which appointed her mother and Mr. Wright to be her trustees, and which appointment was accepted by them.

The contract was executed, and the marriage took place when Mrs. Benningfield was a minor. The deed provided that the trustees should vest the sum on mortgage over real property: but instead of doing so, it came by the act of the executors of the mother, into the exclusive possession of Wright, on the 23d of February, 1839, after Mrs. Benningfield

had attained the age of majority; and became merged in his private funds, where it remained until he became insolvent. In re Wright.

Cloete quoted Burge's Colonial Law, vol. 3, p. 324, and maintained that Mrs. Beningfield had a tacit hypothec for the amount of the trust funds over the estate of the trustee, as having become her tutor or protector on the 14th November, 1833, the date of the execution of the marriage contract. (Voet 20 : 2, 11, 12.)

The Attorney-General, *contra*, quoted Voet, 20 : 2, 20.

The Court held there was no such tacit hypothec as that claimed; and that Mrs. Beningfield had no claim to preference on Wright's estate.

Motion refused with costs.

4. IN RE SMITH.

THE WIDOW SMITH AND TRUSTEE OF SMITH *v.*
M. NORDEN.

[25th August, 1845.]

Effects of the Non-registration of an Ante-nuptial Contract excluding Community, on Moneys inherited by the Wife during the Marriage, and by her lent to the Husband on the Security of Mortgages upon his Landed Property.

The parties had drawn out the following case to raise the question of law between them:—

On the 1st of November, 1826, William Edward Smith and Mrs. Susannah Bolton, Widow of the late A. B. Laing, intending to enter into marriage with each other, made an ante-nuptial contract, of which the following is a copy:—

“To all to whom these presents shall come, be seen, read, or heard. Be it known that on this the 1st of November, 1826, before me, Charles Whitcomb, of Cape Town, Cape of Good Hope, Notary by authority of the United Parliament of Great Britain and Ireland, duly created, admitted, and sworn, and in the presence of the witnesses hereinafter named, personally came and appeared Mrs. Susannah Bolton of the same place, widow of the late Alexander Burrell Laing, deceased, of the one part, and Mr. William Edward Smith of Graham's Town, within the colony of the Cape of Good Hope, of the other part, being both of competent ages, who did declare to have contracted and agreed each with the other in manner and form following (that is to say),—Whereas they the said appearers do, and each of them doth, intend shortly to enter into lawful marriage with one another upon the following

The Widow
Smith and
Trustee of
Smith
v.
M. Norden.

conditions and stipulations ante-nuptial. Imprimis she the said appearer shall bring with her all the goods, chattels, effects, and credits, nothing excepted or reserved, which she now possesses. And it is further agreed that no community of property shall exist between them the said appearers on entering into the matrimonial state; and consequently the one shall on no account whatsoever be responsible for the debts incurred by the other, much less become amenable or executable for the same, but on the contrary, all such debts shall be borne and paid by the party who has made or contracted the same, and that inheritances, bequests, and all other extraordinary acquisitions which shall or may be obtained during the marriage of them the said appearers, shall not be considered by them as gain, but as property, and consequently go to the collateral heirs, and to the blood of him or her by whom such inheritances, bequests, and other extraordinary acquisitions may have been acquired as aforesaid; and further, that all such gain and loss which may happen during the said marriage shall be in common and shall come to or be put to the account of the joint estate, and therefore to the profit and loss of both the said appearers, she the said appearer, on her part however, hereby expressly reserving to herself and to her heirs the privilege, at the dissolution of the said marriage, or during the same, by her last will and testament, after a true statement and inventory both of her and the said W. E. Smith's property shall have been delivered to her to choose whether she will participate in the profits and losses which may have taken place during the said marriage or not; or if such inventory be not obtainable, in that case she the said appearer reserves to herself the right of recovering the property brought with her or acquired by inheritance or otherwise, the privilege of legal mortgage or right of preference due to all women on the estates of their husbands, and interpreted in a most favourable manner according to the written and imperial laws. Upon all which conditions the said appearers hereby respectively promise to solemnize their said intended marriage, and reciprocally to act up to the tenor of these presents, binding, for the true and genuine fulfilment thereof, their persons and property according to law.

“Thus done and passed at Cape Town, the day and year aforesaid, in the presence of Charles Jacob Garisch and Thomas Savill as witnesses. The minute hereof is duly written and signed, and now remaining in my protocol on a stamp of six rixdollars.

[illegible]

This contract was never registered, and the parties were subsequently married.

2nd. Mrs. Smith during the marriage became entitled to a certain sum of money by way of inheritance, and at the request of the said W. E. Smith, and assisted by him, she passed a power of attorney to William Williams of Dorchester, to enable him to recover the inheritance, and as some of the creditors of the said W. E. Smith were then pressing him for payment of debts due and owing by him to them, she gave also at his request, and upon his promise to give her adequate security, an order to Henry Maynard of London to receive the amount from the said William Williams, and drew upon him for the sum of £350, which draft Messrs. C. & H. Maynard of Graham's Town endorsed or discounted; and the amount was paid by them to the creditors of the said W. E. Smith upon the order of the said S. Smith.

The Widow
Smith and
Trustee of
Smith
v.
M. Norden.

On the 14th July, 1835, the insolvent, by his agent, passed a mortgage bond for the said sum of £350, a copy of which is hereunto annexed, marked A,* but the power of attorney, enabling his agent to pass the said mortgage, was dated 11th April, 1835. Subsequently to the advance of the sum of £350, Messrs. C. and H. Maynard received intelligence from the said H. Maynard that he had received the amount of the inheritance left to Mrs. Smith, and after deducting certain charges and the above advance they informed her that the balance of £648 7s. 6d. was at her disposal. The insolvent proposed to the said S. Smith to lend him the amount of the said balance, to which she agreed, upon the understanding that he should give her a good and sufficient security for the amount. Whereupon she gave an order upon the said C. and H. Maynard in favour of the insolvent, to whom the amount was paid in several sums in the month of January, 1836. In addition to the balance of £648 7s. 6d., Messrs. C. and H. Maynard subsequently received £16 16s. 6d. for arrears of interest on the legacy received by them on account of the said S. Smith, which amount was also paid to the insolvent upon his order.

On the 6th January, 1837, the insolvent, by his agent, passed a second mortgage bond for £666 16s. 6d., copy of which is hereunto annexed, marked B,† the amount lent to him as aforesaid, but the power of attorney enabling the agent to pass the said bond is dated 22d June, 1836. And the said Susannah Smith claims a preference on them, but the trustee refuses to rank her as a preferent,—First, on the ground of the non-registration of the ante-nuptial contract, in consequence whereof it has no legal effect to affect the interests of the creditors in the insolvent estate of W. E. Smith. Secondly,—Because the debts paid out of the money forming the

* The bond annexed, marked A, was a mortgage bond on immoveable property,—the consideration being "money paid by Mrs. Smith to Smith's creditors."

† The consideration inserted in this bond was "money lent and advanced."

The Widow
Smith and
Trustees of
Smith
v.
M. Norden.

consideration of the said mortgage bonds were expended by the said W. E. Smith in the payment of debts contracted by him during the marriage. Thirdly,—Because the second mortgage bond of £666 16s. 6d. purports to be money lent and advanced by the said Susannah Smith to the insolvent, and the money advanced was so advanced in January, 1836, whereas the bond was not passed till the 6th January, 1837, when he alleges the insolvent was in difficulties and contemplated the surrender of his estate.

On the part of the widow it is admitted that the antenuptial contract between her and the insolvent was not registered.

It is also admitted that the money forming the consideration of the said mortgage bonds was expended or appropriated by the insolvent in the payment of debts contracted by him previous to the receipt of the money, and which debts were contracted during the marriage.

The trustee produces the account hereto annexed, marked C, in the handwriting of the insolvent, which he considers throws great doubt upon the legality of the bonds, and proves that no value was ever given for the first bond of £350, inasmuch as that sum is only brought to the credit of the account in November, 1835, whereas the bond itself was passed on the 14th July, 1835, and consequently that the amount mentioned as having been paid to the insolvent's creditors could not have been so paid.

The widow never having seen the account in question until after the death of the insolvent is unable to give any explanation in respect thereof.

W. PORTER.—C. BRAND, for S. Smith,
H. CLOETE, for B. Norden.

C.

DR.	Mrs. W. E. SMITH.			CR.			
1835—	£	s.	d.	1835, Nov. 2—	£	s.	d.
To cash for cart order on Maynard	65	0	0	By cash from Messrs. May- nard Brothers & Co. .	350	0	0
1836—				1836, Jan.—			
Paid Mandy for furniture, viz., dining tables, sofa, and sideboard	42	0	0	By cash from Maynard .	648	0	0
Paid McKenny for sofa .	24	0	0	1837—			
To balance	1003	0	6	By cash from Maynard .	16	16	6
				Nov. 2—			
				By two years' interest .	120	0	0
	£1134	16	6		£1134	16	6
1836—							
To cash paid Arderne, for making chairs	9	15	0	By balance due 2nd No- vember, 1837	£1003	0	6
Four-post bedstead . .	4	17	6				

“Articles of furniture sold by the late W. E. Smith, previous to his leaving Graham's Town, and he received the proceeds.
“SUSANNAH SMITH.”

The Attorney-General, for the widow, maintained that by the law of Holland an *unregistered* ante-nuptial contract excluding the *community* of property, was sufficient to prevent the community and keep the estates of spouses distinct and separate; and that the Placaat of 30th July, 1624, was never in force in Holland. (*Vide* Van der Linden's Institutes, b. 1, c. 3, § 3, p. 74; Voet 23: 4, 4 and 50; Van der Keessel, Thes., 97.) That therefore the ante-nuptial contract in this case was sufficient to exclude and prevent the community unless there can be shown some local enactment or law in this colony which makes registration necessary to render such an ante-nuptial contract effectual to prevent the community. (Proclamation of General Janssens, 15th May, 1805; Burton's Insolvent Law, p. 134; Voet 20: 1, 10.)

The Widow
Smith and
Trustee of
Smith
v.
M. Norden.

2dly. He maintained that if the ante-nuptial contract be effectual without registration, it was effectual not only to prevent a community of property, but also to prevent either party from being liable for debts contracted by the other party, either *ante-nuptias vel pendente matrimonio*, and referred to the terms of the deed, and maintained that the terms as to community of gain and loss do not render the wife liable for the husband's debts. (Voet 23: 4, 53; Burge's Colonial Law, vol. 1, p. 324: as to the right of election reserved to the wife in the contract.)

3dly. He denied that the facts, even as alleged by the respondents, were sufficient in law to entitle them to cut down these bonds as illegal preferences given to the wife by the husband; and referred to the 183d section of Ordinance No. 6, 1843.

4thly. He denied that the account made out by the husband was any proof of the statements therein made, even if they were relevant, which he denied. And therefore maintained that the widow was entitled to the preference claimed by her on the two bonds; and the trustee's account must be amended.

Cloete, *contra*, on the first point referred to the Placaat of 30th July, 1624, preamble, and maintained that although it was not observed in the Province of Holland, it was observed in other Provinces; and to the Proclamation of General Janssens, 14th May, 1805; Van der Keessel, Thes. 229.

On the second point he maintained that the only debts for which it was provided that they should not be mutually responsible were debts contracted before marriage; and that this was proved by no inventory of the separate estates being made, and by the fact that no clauses had been introduced giving the wife a power to contract debts *stante matrimonio*, or excluding the husband from the administration inherent in his *jus mariti*, and in exercise of it to contract debts binding on both the spouses and the separate properties. That even

The Widow
Smith and
Trustee of
Smith
v.
M. Norden.

though the money which devolved to the wife during the marriage was a bequest, and therefore not considered as one of the *gains* which were made common, yet that it was liable for her husband's debts. And that *in ambiguis* the presumption is in favour of the *communio*, and therefore all doubtful provisions must be construed as consistent with the common benefit. He maintained that the house the subject of the mortgage was common property notwithstanding the contract, merely because it was purchased *stante matrimonio*, failing any proof that it was acquired by the wife out of the separate property; and therefore that it must be presumed to have been acquired by the gains of the parties during the marriage. (Grotius Intr. b. 2, cap. 12, §§ 8-12; Matth. de Auctionibus 1: 19, § 30; Voet 23: 4, 50.)

Further hearing adjourned.

Postea (28th August, 1845).—Cloete proceeded with the argument, and quoted Burge, vol. 1, 320-322; and maintained that, even if a bond which had been bequeathed to the wife *stante matrimonio*, and which was found *in specie* unalienated by the husband at the time of the insolvency, might be held to be still *extra communionem*, and therefore not liable for the debts contracted *stante matrimonio*,—yet the bonds in question were in a very different situation from that, because here the wife's money was by her delivered over, or suffered by her to be delivered over, to her husband, and spent by him in paying debts which were then due by them, jointly, and the bonds were only given after an interval, and therefore were not in a situation analogous to that of a *kusting-brief*, but were in the same situation as the property spent in manner aforesaid, in consideration of which they were given.

Ebden followed on the same side, and maintained that it was clear that the same policy which led to the enactment of the Proclamation of January, 1805, to the extent to which the widow's counsel admitted it went, would lead to its enactment to the extent maintained by the creditors, namely, that it cuts down, as in a question with creditors, every right which she derives from the ante-nuptial contract. He maintained that, at all events, the Proclamation of 1805 destroyed all right of tacit hypothec of the wife under the contract, and that if she had no tacit hypothec in virtue of the contract, there was no consideration given by or received from her to support the granting of the bonds to her. (Burge's Colonial Law, vol. 1, 317.)

Further hearing adjourned.

Postea (30th August, 1845).—By consent of the widow Smith, and of B. Norden, both as trustee and as attorney of Mark Norden, judgment was given that the said B. Norden

do pay to the widow Smith £450 in full of all demands, and under condition that she shall not be disturbed by any claims or demands of the said Mark Norden in regard to any supposed liability of the said widow Smith to any such claims or demands by reason of anything contained in, or connected with, the ante-nuptial contract of the insolvent and the said widow Smith, or the non-registration of the said contract. All costs on both sides to be paid by the trustee out of the insolvent estate ; but those of the widow not to exceed £30.

The Widow
Smith and
Trustee of
Smith
v.
M. Norden.

5. HEINEMANN'S CREDITORS *v.* GARRITSON, WIFE OF HEINEMANN.

[16th February, 1847.]

An Ante-nuptial Contract in the Hebrew Language, containing a Marriage Settlement and professing to be founded on the Laws and Customs of the Jews, made at Charleston, in North America, and alleged to have been registered in the Secretary of State's Office in Charleston, is not "prima facie" entitled to be ranked in Preference, in a question with the Husband's Creditors.

On the 23d May, 1846, a summons was taken out at Chambers, by Sarah Garritson, wife of Levi Heinemann (both being Jews), calling on the registrar of deeds to show cause why he should not enregister in the public debt registry of this colony a certain marriage settlement signed by Levi Heinemann in favour of the applicant, at Charleston, in America, and registered in the Secretary of State's office, at Charleston, on the 14th June, 1839.

Heinemann's
Creditors
v.
Garritson,
Wife of
Heinemann.

This document, which was written in Hebrew, with a translation thereof, having been produced at Chambers to the Chief Justice on the 25th May, 1846,—It was ordered, "That the deed in question be enregistered *ad interim*, subject to all legal objections which may be hereafter raised as to its being allowed to remain on the register, or as to the validity or effect of such registration." This deed was enregistered accordingly, and a few days afterwards the estate of Heinemann was surrendered as insolvent. At the second meeting of his creditors, holden before the Master, Sarah Heinemann claimed, and was allowed to prove, a debt against her husband's estate, to the amount of £450, "per affidavit and account for a virgin dowry as per deed of marriage settlement annexed, 200 silver zuzims, or £50. For a marriage gift as per deed of settlement, 2,000 American dollars, or £400."

Heinemann's
Creditors
v.
Garritson,
Wife of
Heinemann.

In the distribution and liquidation account of Heinemann's estate the trustee awarded to the said Sarah Heinemann in respect of the above proof of debt, a preference for £235 17s. 10d., thereby exhausting all the assets in the estate.

Against this preference awarded, Landsberg and Stein, two of her concurrent creditors, lodged objections in which they "denied that the wife of the insolvent is entitled to the preference which has been awarded to her, and alleged that the debt, by virtue of the document, has not been duly proved. And that although the document in question was registered in the public debt register on the 25th May, 1846, a week prior to the surrender of the estate, yet the registration of it, under the circumstances connected therewith, entitles it to no preference, and probably not even to be allowed to rank in concurrence."

This day, the Attorney-General and Ebdon, for the objecting creditors, maintained that the alleged marriage contract was not a deed proper for registration in the deed register of this colony, because it was not a notarial deed; and therefore, though registered, could be entitled to no hypothec or preference; and quoted Burton's Insolvent Law, p. 134. 2dly. That by the Law of Carolina, which was the *lex loci contractus*, the wife has no hypothec in security of the husband's obligation to her in their ante-nuptial contract; and therefore it must be held that the parties neither intended to contract, nor did contract, that the wife should have a hypothec. Consequently, that she could not, by any act subsequently done by her in this colony, alter the nature and extent of her husband's obligation to her on the contract, and acquire a hypothec or preference in security thereof, which she had not stipulated for when the contract was executed. 3dly. That the registration, even if otherwise valid, ought to be annulled, in respect it was collusive, and made with the intention of defrauding the creditors of her husband, who was at the time in contemplation of his estate being surrendered as insolvent.

At the request of Brand on the part of Mrs. Heinemann, he was allowed until the 25th instant to reply.

Postea (25th February, 1847).—This day, before Brand commenced his reply, the Court expressed their opinion that the mere production of such a document, written in Hebrew, and professing to be founded on the laws and customs of the Jews, even supported by the wife's affidavit, was not *per se* sufficient to prove the debt claimed by her, the same being objected to by other creditors;—and that—in respect that it was thereby rendered necessary for the wife to prove the constitution and validity of the debt claimed by her, by other evidence than the mere production of the alleged Hebrew deed, and in respect also of the important points of law

involved in the question as to her right of preference if the existence of the debt should be fully proved,—this case could not competently be decided on motion, and the wife must therefore establish both the existence of the debt and the preference claimed on it in the regular form of an action. They accordingly ordered that she should file a declaration.

Heinemann's
Creditors
v.
Garritson,
Wife of
Heinemann.

6. WRIGHT v. BARRY ET UXOR.

[8th August, 1850.]

An Underhand Ante-nuptial Contract, executed by the two Spouses, and attested by two Witnesses, held insufficient to bar the Creditors of the Wife from claiming from the Husband for Debts contracted by her before the Marriage.

In this case, the plaintiff claimed from the defendant, M. Barry, the sum of £239 1s. 11d., as and for goods sold and delivered to the defendant's wife, previously to her marriage with the defendant.

Wright
v.
Barry et Uxor.

The defence set up was, that before his intermarriage with Ann Broster, his wife, the defendant had entered into an ante-nuptial contract with the said Ann Broster, by which it was agreed "that they should not be responsible or liable for each other's debts, contracted previously to the marriage, but that the said debts should be discharged by whomsoever the same had been so contracted."

The ante-nuptial contract was underhand, and attested by two witnesses. Pending the proceedings, Ann Barry surrendered her separate estate.

The Attorney-General and Watermeyer appeared for the plaintiff, and Ebdon for the defendant.

The Attorney-General argued against the validity of the ante-nuptial contract, at least against third parties (and quoted Van der Linden's Institutes, p. 74), in respect that it was not executed notarially, or by public instrument, in any sense of the term; and further, quoted the Dutch Civil Code, § 202, Voet, 23: 4, § 50.

The Court, in giving judgment, held that an ante-nuptial contract, executed by only the signature of the two spouses, and attested by two witnesses, is not sufficient in law to bar the creditors of the wife from recovering from the husband for debts contracted before the marriage; and therefore gave judgment for the plaintiff against Barry, the husband, as prayed.

CHAPTER III.

CONSEQUENCES OF MARRIAGE IN RELATION
TO PERSON AND PROPERTY.

1. MARITAL POWER—"PERSONA STANDI IN JUDICIO."
 2. CONTRACT BY WIFE.
 3. COMMUNITY—WILL.
 4. COMMUNITY—DEBT DUE BEFORE MARRIAGE.
 5. "PERSONA STANDI IN JUDICIO."
 6. DITTO.
 7. MAHOMETAN WIFE—EVIDENCE.
 8. MARRIAGE OUT OF COMMUNITY.
 9. MARITAL POWER.
 10. MORTGAGE BY SURVIVING WIFE.
 11. SURVIVING WIDOW'S LIABILITY.
 12. COMMUNITY—REAL AND PERSONAL ESTATE.
 13. COMMUNITY IN SECOND MARRIAGE.
 14. CESSION OF WIFE'S SEPARATE BOND BY HUSBAND.
 15. RENUNCIATION OF LEGAL RIGHTS "STANTE MATRIMONIO."
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- ✓ 1. PRINCE, qq. DIELEMAN v. ANDERSON AND OTHERS.

[26th March, 1829.]

A Widow, Re-married out of Community of Property to a Second Husband, held Incompetent to appear in Court to confess Judgment for the Amount of a "Kinderbewys" executed before the Second Marriage, by which the Paternal Portions of the Children of the First Marriage had been ascertained.

Prince,
qq. Dieleman
v.
Anderson
and Others.

In this case, provisional sentence was claimed by the attorney of the two sons of the defendant, their mother, now married for the second time to Anderson, for the amount of their paternal inheritance, due to them under the mutual will of

their father and mother, as it has been ascertained by a *kinderbewys*, executed by the defendant, Mrs. Anderson, before her second marriage.

Prince,
qq. Dieleman
v.
Anderson
and Others.

The defendant, Mrs. Anderson, who favoured the claim of her sons, wished to appear and judicially acknowledge the debt as claimed.

Cloete and Joubert appeared for her husband, Anderson, and objected that being under his legal guardianship, she could not appear without his consent. Voet 2: 4, § 10; Van Leeuwen's Censura Forensis, 1: 4, 5.

The Attorney-General and Denyssen, for the plaintiff, maintained that as Mrs. Anderson was married to Anderson *without community of goods*, and as the whole of her property was excepted from the *jus mariti*, she was in consequence entitled to appear for herself in an action which related exclusively to her separate property.

The Court sustained the objection made by the husband. (*Vide* Voet 5: 1, § 15-17; 23: 2, § 41; 23: 4, § 20; Van der Linden's Inst., b. 1, c. 3, § 7.)

2. ✓ EXECUTORS OF MORKEL *v.* HEIRS OF MORKEL.

[22d December, 1829.]

The Husband's consent is necessary to create a Debt which shall be Valid against the Wife's share of the common Estate after her death.—The Wife cannot be bound as a Surety without her Husband's consent.

In this case, the parties had filed a statement of facts admitted by both, and prayed the judgment of the Court on the following question of law arising therefrom, viz.: Whether a verbal declaration made by a wife (married in community of property) without the consent of her husband, that Wm. Morkel (who had paid certain sums on account of the wife's son by a former marriage), should never suffer by the amount which he had paid for her son, was sufficient after her death to create a debt against her estate to the said Wm. Morkel for the sums which he had paid for her son.

Executors of
Morkel
v.
Heirs of
Morkel.

The Court were unanimously of opinion that the declaration was not sufficient to bind her estate, and gave judgment accordingly.

3. CAFFIN ET UXOR v. HEURTLEY'S EXECUTORS.

[14th June, 1832.]

Where the Testator, married in Community of Property, by his Will bequeathed to his Wife in the following terms in a Notarial Will: "One moiety or half part or share of HIS Property, together with the Houses and the whole of HIS Furniture, situate Nos. 8 and 55 Dorp-street, Cape Town, with the WHOLE of the Slaves" (these Houses and the Slaves in fact forming a part of the Property in Community); and further desired that "the whole of HIS Property, both real and personal, with the exception of the Houses, Furniture, and Slaves, hereinbefore-mentioned, should be sold by Public Auction;" and afterwards made a Codicil wherein he altered his Will as follows:—"I, R. H., for certain good reasons, do hereby cancel and make void such part of my Will as applies to my present residence in Dorp-street, No. 8, as also my Furniture, and Slaves given to my Wife J. S. H.; and I direct that the same shall form part of my general Property, the same to be disposed of by my Executors named in my said Will, and THAT MY WIFE SHALL BE ENTITLED TO ONE MOIETY OR HALF-PART OF MY PROPERTY, BOTH REAL AND PERSONAL,"—the Court held that by virtue of the Matrimonial Community the Wife was entitled to one-half of the Common Property, and under the Codicil to one-fourth more, being the moiety of his Property left her by her Husband, in addition to the matrimonial half.

Caffin et Uxor
v.
Heurtley's
Executors.

In this case, it was admitted that the late R. Heurtley and his wife, now married to the plaintiff, Caffin, were legally married in this colony in community of goods, according to the laws of this colony.

That on the 4th December, 1805, they executed a joint mutual will and testament.

That on the 5th April, 1830, the said Heurtley, by himself alone, duly executed before a notary and witnesses a new will whereby he revoked his former will of the 4th December, 1805, and which new will contained *inter alia* the following clauses:—"The testator hereby appoints his wife, J. S. Heurtley, as also his father, William Heurtley, to be the sole heirs of this his last will and testament. The testator hereby gives and bequeaths to his wife, J. S. Heurtley, one moiety or half-part or share of HIS property, both real and personal of every sort or kind, together with the houses and the whole of HIS furniture, situate Nos. 8 and 55 Dorp-street, Cape

Town, together *with the whole of the slaves*, the same to remain at her whole and sole disposal:—to M. A. Bergh, &c., as also to C. H. Elliot, &c., the testator gives and bequeaths to each of them the sum of £50. (The testator then gave certain trifling legacies of watches and snuff-boxes to certain other persons.) All the rest, residue and remainder of *his* property the testator bequeaths to his father, William Heurtley," &c., &c.

Caffin et Uxor
v.
Heurtley's
Executors.

"It is the desire of the testator that, as soon as may be after his decease, *the whole of HIS property, both real and personal, with the exception of the houses, furniture, and slaves, hereinbefore-mentioned*, shall be disposed of by public auction by his executors, to enable them to fulfil the trusts hereby reposed in them."

That the testator appointed the two defendants to be the executors of his said will.

That on the 15th April, 1830, the said Heurtley duly executed a codicil, containing *inter alia* the following clause:—"I, Richard Heurtley, for certain good reasons, do hereby cancel and make void such part of my will as applies to my present residence in Dorp-street, No. 8, as also my furniture and slaves given to my wife, J. S. Heurtley; *and I direct that the same shall form part of MY general property*, the same to be disposed of by my executors named in my said will, and that *my wife shall only be entitled to one moiety or half-part of MY property, both real and personal*. The remaining money to go to and be divided in the same manner as stated in my will, save that the small house opposite my present residence I give and bequeath absolutely and solely to my faithful and true wife."

That the said Heurtley died soon after the execution of the above codicil. That the defendants entered upon the administration of all the property belonging to the estate in community between the deceased testator and his wife, at the time of his death, except the small house, No. 55, Dorp-street, specially bequeathed to her, and disposed of the same by public auction, the net proceeds of which amounted to £7002 5s. 10½d., one half of which, being £3601 2s. 11¾d., they awarded to the widow Heurtley, in their distribution account and supplementary account of this estate rendered by them, dated 5th May, 1831.

The widow Heurtley thereafter married the plaintiff, Caffin, who thereupon brought this action against the defendants, the declaration in which, after setting forth the above facts, set forth "that the plaintiff, as being now married to the said widow of the late R. Heurtley, has demanded from the defendants, in the capacity of testamentary executors, an account of their administration in the said estate, *and payment of the moiety of the estate of the said late R. Heurtley*, but that the

Caffin et Uxor
r.
Heurtley's
Executors. said defendants have tendered an account of the joint estate of the late R. Heurtley and wife, and have therein awarded to the plaintiff *nomine uxoris* only the legal half share of the joint estate, but refuse to allow to the said plaintiff the moiety of the estate of her late husband to which she is entitled by the will and codicil of her late husband;—and the said plaintiff finally saith that the moiety of the estate of the said R. Heurtley by the account rendered by the said defendants, amounts to a sum of £1800 11s. 5½d., for which amount this action is brought.”

In their plea, the said defendants, as executors of R. Heurtley, and also by intervention as general agents for and on behalf of W. Heurtley, the father of the said R. Heurtley, admitted all the matters of fact in the said declaration contained to be true, but denied that the will executed by the said R. Heurtley, bearing date 5th April, 1830, related to his own estate only, and maintained that the said will related, and was by the said testator intended to relate, to the whole estate of which he was then in the enjoyment or possession, and which comprehended that portion thereof which, upon his death, would, by the laws of this colony, descend to his wife; and alleged that the said R. Heurtley was a native of Great Britain, and did by his own industry acquire all, or almost all, the property which he left behind him at his death, and gave the notary, G. Cadogan, whom he directed to make the said will, positive instructions to use the words “his property,” when he disposed of that part of the joint property, which by law he could not dispose of away from his wife; and the said notary then informed the said testator that he could not call the same his property, as, by law, his said wife was entitled to one moiety of the whole property of which he died in the possession, and that the said testator replied that he should leave to his wife all that the law required, but directed him, the said notary, in disposing of the same to her, to use the words “his property,” as he had acquired the same by his own industry, which was done by the said notary accordingly;—and that by the codicil in the said declaration mentioned, the said testator did not alter or revoke, and did not intend to alter or revoke, any part of his said will, except in so far as related to his houses in Dorp-street, his furniture and slaves. And these defendants therefore say that, by the true construction of the said will and codicil, and by the intention of the said testator, it was the said testator’s will that his wife, Johanna Sophia Heurtley, should only receive her legal half-part of the joint estate, and not the half-part of the said testator’s separate estate in addition thereto, and this the said defendants are ready to verify, and thereupon join issue with the said plaintiff.

In the replication the said plaintiff denied all and every allegation in the said defendants’ plea contained, save and

except in so far as they admit the facts contained in the plaintiff's declaration. And the said plaintiff further said that the intention of the late R. Heurtley can only be construed and inferred from the last will and testament of the said late R. Heurtley, dated 5th April, 1830; and on these grounds the said plaintiff joins issue with the said defendants.

Caffin et Uxor
r.
Heurtley's
Executors.

The Attorney-General, for the defendants, quoted Domat, pt. 2, b. 3, lit. 1, § 6, *Brissonius de Verb. Signif. voce Bona*, and maintained that by the word "*his property*," the testator clearly meant to describe the whole of what, in common parlance, was *his property* at the time he was making the will, namely, the whole property in communion of which, while *he lived*, he had the *absolute disposal*, and not merely the one half share of the goods in communion of which he could dispose by will, to the exclusion of his wife after his death.

And maintained that if the Court should think that the words "*his property*" were ambiguous, he was entitled to prove, by the evidence of the notary who made the will, which he tendered, that the testator used the words *his property* in this sense, and intended that they should bear and receive the sense which in the plea it was maintained they should now receive.

Cloete, for the plaintiff, replied and maintained the contrary, and quoted Van der Linden's Inst., b. 1, c. 3, § 8, pp. 86-88, and the Proclamation of the 12th July, 1822; and further maintained that there was no ambiguity in the will which could make it competent to receive parole evidence to explain the testator's intentions.

[*Cur. Adv. Vult.*]

Postea.—The Chief Justice and Kekewich, J., held that there was no ambiguity in the words "*his property*," and that they must, in law, receive the construction which the plaintiff contended for.

Burton, J., concurred in this opinion, but having been absent when the case was argued, did not give any judgment.

Judgment was given by the Court for the plaintiff, as prayed, with costs.

Menzies, J., dissented, and was of opinion that judgment ought to be given for the defendants, with costs, on the following grounds:—

He held that the plaintiff, in right of his wife, was here *in petitorio*, and must therefore fully make out and establish her claim, for that the defendants, who represent the testator's father, have by virtue of his appointment as residuary legatee, a clear and undoubted right to take anything to which the plaintiff fails to establish a clear and undoubted right.

He held that in the law of Holland it was a clear and well established rule for the construction and interpretation of wills, that where the words used in a will are in themselves clear,

Caffin et Uxor
v.
Heurtley's
Executors.

and, when taken in the sense which they have in common acceptation, themselves raise no ambiguity; and where no doubt as to the sense in which the testator intended to use these words is raised by any other expressions in the will, or by any circumstance manifestly appearing from the will itself, *the words* must be construed according to their construction in common parlance where they are words of common parlance, and according to their established technical construction where they had a fixed and certain technical meaning given to them in law or practice, notwithstanding any averment or suggestion, however strong it may be, proposed to be proved by evidence extrinsic of the will, that the testator when making it intended to use them in a different sense would be given to them. (*Vide* Van der Linden's Inst., b. 1, c. 9, § 9, p. 143; Voet 34: 5, § 1 (first four lines); 34: 5, § 2 (first five lines); 34: 5, § 4 (*et generaliter*); Domat, pt. II, b. 3, lib. 1, § 6, note 3, 15, 16.)

[Burton, J., concurred that such was the rule of the Dutch Law.]

That the plaintiff in support of his claim could derive no benefit from this rule, because he had produced no evidence to show that in common parlance, nor any authority to show that according to any established technical construction, the words "his property," when used by a husband, were deemed to apply only to half of the goods in community, and not to the whole of which, so long as he lived, he had the absolute disposal. On the contrary, he held that in common parlance the words "his property," when applied to a husband, were constantly used to express the whole goods in communion, which were under his control.

That it was proved by a reference to *Brissonius de Verborum Significatione vocib. Meum et Suum*, and by the Pandects D. 32, tit. unic., l. 71, 73, 74; D. 50: 16, l. 239, § 9; D. 23: 2, l. 45 and 46 (*non obstante* D. 30, tit. unic., l. 5, §§ 1, 2, as is evident from l. 6, *ibid*, and D. 28: 7, l. 2): that the words "*my* property," and "*his* property," were constantly used to signify property possessed in common by the person to whom those pronouns referred, and another,—and property to which such person had not the sole and exclusive right. It is true, that where a testator bequeathed a legacy of any thing described as *my* or *his* property, and the thing was the common property of the testator and another, or the testator had not the sole or exclusive right to the thing, the legacy was interpreted to be only that portion of, or qualified right in, the thing which belonged to the testator, and had not the effect of giving the legatee a right to claim the whole thing, or an absolute and unqualified right to the thing; but no analogy can be drawn from that rule of the civil law to support the plaintiff's construction in this case, because there

is a manifest and marked distinction between the cases, viz.: in the case supposed of the legacy, the testator had not, when he made his will, the absolute right of disposal *de presenti* of the thing bequeathed, which the testator in the present case had;—and because it is evident from Voet 32: tit. unic. § 28; Van Leeuwen, Cens. For., pt. I, 3: 8, § 25; Vinnius ad Inst., 2: 20, § 4, note 3, p. 392, that this rule was established in favour of the heir: *Quod et verba et mens testatoris hinc pro herede faciunt*. This was presumed to be the intention of the testator, because it was not to be presumed that he intended to impose on his heir the burden of buying up the portion of, or the right in, the thing which did not belong to the testator, in order to bestow it on the legatee. *Mens testatoris, quia, etiamsi res dubia esset, non facile crederetur testator onerare heredem suum voluisse necessitate redimendi*. D. 31, tit. unic., l. 67, § 8. And the words used by him were deemed sufficient to carry the intention of the testator, as presumed by the law, into effect, because the *meum* admitted of being so restricted in its meaning as to be applied only to that portion of a right in the thing which belonged to the testator. "*Verba, quia FUNDUM MEUM recte interpretamur, quatenus meus est, nam meum etiam recte dicitur quod pro parte meum est, quamvis totum meum esse non recte dicatur.*" It may be true that if the construction contended for by the defendants be given in the present case to the words *one half of his property*, that the bequest will convey nothing to the widow but what she would be, by law, entitled to, and that therefore the bequest may be *legatum inutile*. But the question here is not whether the bequest is or is not *legatum inutile*, but what is the meaning which the testator intended should be expressed by the *descriptive words* "*his property*;" and it is clear from Vinnius ad Inst. 2: 20, §§ 10 and 14, that *descriptive words* are not qualified or affected by the consideration that the legacy would be *legatum inutile*,—that a different interpretation to that which properly belongs to them is not to be given to *descriptive words* in a testament, because if that interpretation were given them the legacy would be *legatum inutile*, by merely giving to the legatee what was already his own.

The law of Scotland, in so far as relates to moveables, is almost precisely the same with that of this colony, as to the division of the goods in community after the death of one of two spouses who have no children, as to the absolute power of disposal *de presenti* by the husband of them during the lifetime of both, and his incapacity by will or any *mortis causâ* deed to bequeath or dispose of, after his death, more than his own half of the goods in community at the dissolution of the marriage, the other half of which devolves by law to the wife in her own right; and yet in that law the whole moveables in

Caffin et Uxor

v.

Heurtley's
Executors.

Caffin et Uxor
v.
Heurtley's
Executors.

community at the dissolution are instantly called and treated of as the "*husband's moveables or goods*," "*HIS moveables or gear*," "*HIS moveable estate*." "*The HUSBAND cannot dispose of HIS MOVEABLES to the prejudice of the *jus relictæ* by testament*," although this *jus relictæ* or right of the wife, to a half of the goods in community, when there are no children, is expressly stated to be a *right of division of a common subject*. (*Vide* Stairs' Institute, 3: 4, 24; 8: 43, 44, 52; Erskine's Institute, 3: 9, 15, 16, 19.) But what is still of more importance in the decision of this case, in the Proclamation of the 12th July, 1822, which is the only colonial law relative to the present subject which was enacted in English, the words "*his property*" are clearly, and beyond the possibility of doubt or dispute, used precisely in the sense in which the defendants maintain these words are to be construed in the present case. That Proclamation enacts, "That it shall hereafter be considered lawful, regular, and of full force, for all residents and settlers in this colony of the Cape of Good Hope, being natural-born subjects of the United Kingdom of Great Britain and Ireland, to enjoy the same rights of devising *their* property, both real and personal, as they would be entitled to exercise under the laws and customs of England; provided, however, that in case any such natural-born subject of, &c., &c., shall enter into the marriage state within this settlement, without making a previous marriage settlement (called in the colonial law term ante-nuptial contract,) HIS PROPERTY in such case, both real and personal, shall be administered and divided according to colonial law, notwithstanding any subsequent testamentary devise, unless such testamentary devise be made in conjunction with the wife of the party, according to the colonial law on this head."

On these grounds he was of opinion that, both according to the construction used in common parlance, and according to the technical construction which these words have received in the law of this colony, the words "*his property*" in the will under consideration must be deemed in law to mean the whole goods in community at the dissolution of the marriage; and that consequently on this ground taken by itself, the defendants are entitled to judgment, with costs.

If it should be held that the defendants' case had not been sufficiently established by what has just been stated, then he held that, viewing the plaintiff's case in the more favourable light in which it could be placed, the words "*his property*" must be considered to be in themselves *ambiguous*.

He held that in the law of Holland it was a clear and well-established rule for the construction and interpretation of wills, that where words or expressions in a will are ambiguous, obscure, or uncertain in themselves, or are rendered so by

reason of some other word or expression used in the will with reference thereto, the ambiguity, obscurity, or uncertainty may and ought to be explained from the context, and the intention of the testator as collected from the general tenor of the instrument, and that if a sufficient explanation is not furnished by the context or the general tenor of the instrument, evidence extrinsic of the will is admissible to explain or remove the ambiguity, uncertainty, or obscurity, and that when sufficient evidence for this purpose cannot be obtained, the will, or the particular clause in the will, is null and of no effect. (*Vide* Voet 34: 5, §§ 2 and 4; Domat, part II, b. 2, lib. 1, § 6, notes 8, 12, 17, 19; D. 26: 2, 30; D. 34: 5, 10.)

Caffin et Uxor
v.
Heurtley's
Executors.

[Burton, J., concurred that such was the rule of the Dutch law.]

He also held that, under the above rule, the codicil in this case must be considered as part of the context, and ought to be referred to for explanation, seeing it was intended and has effect ultimately to regulate the disposition of that of which the will was originally intended to regulate this disposition. (Voet 29: 7, § 3 (*Conditionem*); 29: 7, § 4 (the first two lines); 34: 5, § 1; D. 28: 1, l. 21, § 1.)

Under this rule, therefore, it was, in his view of the case, necessary to refer to the context of the will and to the codicil, both of which appeared to him clearly to support the construction put on the will by the defendants. Because it was manifest from the will that he considered the houses in Dorp-street, with the *whole* of the furniture therein, and the whole of the slaves, to be subject to his disposal, and intended accordingly to dispose of the whole of them; and that when he proceeded to make his will, he contemplated the manner in which, after his death, the whole of the goods in community were to be disposed of and distributed by him. If by the words "*his property*" he had meant only his one-half of the goods in community, it must be presumed that he would not have directed his executors to dispose of *the whole of his property by auction*, because in this case the whole of his property could not be sold by auction, unless his wife's one-half share were also sold by auction, which, in that view of the case, he must have known that he had no power to order.

It is also impossible to explain the clause in the codicil which directs the house No. 8, Dorp-street, as also *the whole* furniture, and *the whole* slaves, in the will bequeathed to his wife, should form part of *his general property*, and be disposed of by his executors by auction.

On these grounds he held that if the words *one moiety or half-part or share of his property* were ambiguous, they were, by the context in the will and by the codicil, completely and satisfactorily explained to mean one-half of all the goods

Caffin et Uxor
v.
Heurtley's
Executors.

in community, and not one-half of his half share of the goods in community. If, however, it should be held that the ambiguity, uncertainty, or obscurity of these words was not sufficiently explained by the context of the will and the codicil, he then held that extrinsic evidence was admissible to prove what the intention of the testator really was, and must be had recourse to before judgment could be given for the plaintiff, and that if extrinsic evidence is admissible, the value of the goods in community must *inter alia* be considered as affording *indicia* of the testator's intention.

4. REIS v. EXECUTORS OF GILLOWAY.

[1st September, 1834.]

Where a Widow, who had been married in Community of Property, received her matrimonial half, and for several years continued to receive certain Usufruct bequeathed by her Husband, according to a Liquidation Account framed by the Executors named in a Will, made by her late Husband and herself,—the Court (by a majority) held that, after her death, her Executor was entitled to impeach this Account, as based on an erroneous construction of the Will; and the Account being in consequence re-opened, the Court unanimously held that certain Legacies which the Testator (who had been previously married) had bequeathed to his God-children in a Will made jointly with his first Wife, especially reserved in the present Will,—which Legacies had been charged against the Joint Estate,—should be charged against the Testator's separate Estate; and held further that a certain Amount chargeable during the Marriage against the Joint Estate had, by the terms made use of in the Will by the Testator, “expressly desiring that the same may be strictly observed and performed by HIS Testamentary Executors,” become chargeable on his separate Estate.—The Court also held (by a majority) that a Donation made by the Testator before his second Marriage, and accepted by the Donee—and therefore a Debt actually existing against the Joint Estate during the Marriage, but made payable after the Testator's death—ceased with the dissolution of the Marriage by his death to be a joint Debt,—and became chargeable on and demandable from his separate Estate.

Reis v.
Executors of
Gilloway.

The facts of this case were as follows :—

J. F. Gilloway and his wife, formerly widow of Beukes, on the 12th February, 1809, executed a joint will, whereby *inter*

alia they jointly bequeathed to Mrs. Leibbrandt, the daughter of the testatrix, the usufruct of a sum of £20,000, of which £10,000 were to be taken from the estate of the testator, and £10,000 from that of the testatrix, and placed out at interest, which was annually to be paid out to the said Mrs. Leibbrandt, and the capital to remain unburdened for the behoof of her children, &c.

Reis
v.
Executors of
Gilloway.

The testatrix instituted the testator and her said daughter, Mrs. Leibbrandt, as her heir and heiress, each in the exact moiety of her estate.

The testator bequeathed legacies of £1,000 to each of his eight godchildren, and one of £1,000 to the poor of the Lutheran Church.

On the 4th November, 1813, the testator and testatrix, by virtue of the reservatory clause inserted in their said will, executed a codicil or disposition, whereby they directed *inter alia* a slave called Sanna and her children to be made free after their death, by the executors, at the charge of the joint estate.

Thereafter the testatrix, Mrs. Gilloway, died, and after her decease Gilloway and Mrs. Leibbrandt, the co-heiress with him of his deceased wife's estate, duly assisted by her husband, on the 25th March, 1818, executed a notarial deed, whereby it was mutually agreed that in consideration of £150,000 to be paid over by him to Mr. and Mrs. Leibbrandt, Gilloway was to remain in and hold the full possession and property of the joint estate of himself and his deceased wife, and Mr. and Mrs. Leibbrandt relinquished and gave up in his favour all right to the usufruct or interest of the above-mentioned sum of £20,000, left to her in the said mutual will of 12th February, 1809, on condition, however, that Gilloway should, after her decease, account for the said capital sum of £20,000 to her children, &c.

On the 28th April, 1818, Gilloway executed a notarial deed of donation, by which he promised and determined to give to his nephew, C. F. A. Gilloway, a sum of £50,000, to be paid to him on the decease of the said J. F. Gilloway, out of his estate by preference, as free and unburdened property, on condition that the said nephew should continue to reside in this colony, and be of good moral character at the decease of the said J. F. Gilloway; but reserved to himself the right of annulling this promise and gift, in case of his said nephew violating those conditions. His said nephew also appeared before the notary at the same time, and in the deed which he signed declared his acceptance of the gift.

On the 3d May, 1818, J. F. Gilloway married J. J. Luyt.

On the 24th December, 1818, J. F. Gilloway and his wife, Luyt, executed a joint will and testament, whereby

Reis
v.
Executors of
Gilloway.

inter alia Gilloway revoked the will made by him jointly with his former wife on the 12th February, 1809, but "by these presents inserting and embodying such parts of that will whereby the testator and his former wife bequeathed to her daughter, Mrs. Leibbrandt," the usufruct, and to her children the capital sum of £20,000, and whereby certain slaves were bequeathed to J. F. Leibbrandt, son of the said Mrs. Leibbrandt; and also by these presents inserting and embodying the disposition made in favour of the slave Sanna and her children, in the codicillary disposition of the 4th November, 1813. And further declared that "the before-mentioned hereby inserted and embodied legacies and bequests should hold good and have effect in such manner as is expressly stipulated and directed by the aforesaid will of the 12th February, 1809," and likewise that the said disposition relative to Sanna and her children shall be carried *into effect by his executors*, and that she and her children shall be set free after the testator's demise *at the charge of his estate*. "And now disposing *de novo* the testator declared first and previously, that the promise or gift of £50,000 in favour of his nephew, made by the notarial deed of the 28th April, 1818, be inserted in these presents (*here followed a recital of the said deed*), and declared that he therefore desired that if he shall not have revoked the said deed, and his said nephew shall have performed the conditions thereof, the aforesaid promise made by the said deed shall be of force and effect, and the sum of £50,000 thereby promised shall be paid and discharged to his said nephew, free and unburdened, *without deduction of the Falcidian and Trebellian portions, out of the testator's estate, by preference out of the assets or effects of the testator's estate or inheritance.*"

And proceeding to the election of heirs, the testators mutually declared to institute and appoint each other reciprocally, that is the first dying the survivor of them, together with such child or children as they shall have procreated, to be the sole and universal heirs of the predeceased, in equal shares, in all the property which the predeceased may have at death (*except in case the testator should be the first dying, then after the deduction of the legacies and bequests and codicillary disposition hereinbefore-mentioned, and inserted in the will in manner before-mentioned*).

The will then contained certain other clauses, which it is unnecessary to mention, and the usual reservatory clause.

On the 7th April, 1819, the testator's nephew, C. F. A. Gilloway, died, and on the 10th April, 1819, the testator wrote to his brother, the father of the deceased nephew, a letter, in which *inter alia* he stated, "In my last will I had bequeathed to him, after my death, fifty thousand guilders of

the currency of this place, but as his illness became doubtful, he requested me that I would of this inheritance bequeath £30,000 to his father, and £20,000 to his eldest brother Carl, and which I have also promised him. As he, however, died without making a will, in all probability therefore the Orphan Chamber will take this money under their charge, of which I will write to you more afterwards, but send me by the first opportunity the correct names of your lawful heirs, and for better security a power of attorney on Messrs. B. Wienand and C. Ludwig, in order to enable you to receive the money from the Orphan Chamber after my death;—this is only for reason that the money will not remain there so long. Any further legacies to my family, should I die without heirs, will be discovered at the opening of my will."

Reis
v.
Executors of
Gilloway.

This letter was also signed by his wife, J. J. Luyt.

On the 10th December, 1819, Gilloway and his wife, J. J. Luyt, by virtue of the reservatory clause in their joint will of the 24th December, 1818, executed a codicil thereto, whereby *inter alia* the testators declared "that it is the wish and desire of them both (and the testatrix by reason of the community of property between her and her husband, the testator, in so far as is necessary declared to consent therein) that the legacy of £20,000, bequeathed by the testator and his former wife to Mrs. Leibbrandt and her children (which disposition has been inserted by the testator in the joint will of him and the testatrix, dated 24th December, 1818), as also that certain promise or gift made by the testator to his deceased nephew, C. F. A. Gilloway, by the deed aforesaid, dated the 28th April, 1818, of £50,000, to be paid to him at the death of the testator,—shall be paid out to the respective legatees and the heirs *ab intestato* of the said C. F. A. Gilloway, after the demise of the testator, *not out of the estate of the testator alone, but out of the estate at present jointly possessed by both the testator and testatrix, since the same must be considered as a debt and debit against the estate of the testator at the time of his marriage with the testatrix.* The testators also declared that it was their wish and desire that the slave Sanna and her children should be discharged out of slavery, at the demise of the testator, at the charge of the joint estate of the testator and testatrix." The testator then bequeathed certain moveables to the testatrix, and altered the appointment of one of his executors.

On the 19th September, 1822, Gilloway and his wife, J. J. Luyt, executed a joint will, whereby they revoked all wills and codicils, which they might have previously made, either jointly or separately, and especially their will of the 24th December, 1818, and codicil of the 10th December, 1819, likewise a certain will which the testator made with

Reis
v.
Executors of
Gilloway.

his deceased first wife, dated 12th February, 1809, "with the exception, however, of such legacies and bequests as he has made jointly with his aforesaid late first wife or separately in that will, and by a farther disposition made by virtue of the reservatory clause, all which dispositions he hereby considered as herein inserted, expressly desiring that the same may be strictly observed and *performed by his testamentary executors.*" The will further set forth that it was "the wish and desire of the testators that the slave Sanna and her children should be made free *at the charge of their joint estate.*"

And that in case it should happen that the testators do not procreate children by each other, "the testator disposing of his estate declared previously to bequeath to his wife, during her lifetime, the usufruct of the exact and clear one-half of his estate, which shall be put out at interest, &c., &c., by his executors, and the interest annually paid to his wife, while at her demise the principal sum shall devolve in equal shares and be paid to his heirs in the other half of his inheritance and estate,—wherein he now declared to nominate and appoint as his sole and universal heirs, his brothers' and sisters' children, share and share alike in equal portions." And that "in order to ascertain the portions of the inheritance of the heirs appointed on both sides, it is the further wish and desire of the testators that should the testator be the first dying, the whole joint estate be publicly sold and realized, and thus liquidated within six weeks after his death."

The testators then reciprocally nominated each other as executors of their said will and administrators of their estate and inheritance.

The will concluded with the usual reservatory clause.

On the 12th May, 1828, by virtue of the said reservatory clause, the testators appointed Messrs. R. A. Zeederberg and J. C. Rimrod, together with the survivor, as joint executors and administrators of their estate.

On the 27th May, 1828, the testator, Gilloway, died, without leaving any children.

Thereafter the widow and her co-executors, the defendants, Zeederberg and Rimrod, disposed of and liquidated the joint estate of the testator and testatrix, in terms of the provisions to that effect in the will of 1822.

Thereafter a liquidation account of the estate up to the 1st November, 1828, was framed by the defendants, the co-executors of the widow, wherein were charged against the joint estate as having been paid by the executors,—1st. The legacy of £1,000 to the Lutheran Church. 2dly. The legacy of £8,000 to the testator's eight godchildren. 3dly. The legacy of £20,000 to Mrs. Leibbrandt and her children.

4thly. The legacy of £50,000 to the late C. F. A. Gilloway, the testator's nephew, paid to the Orphan Chamber, on account of his father as his nearest heir, under deduction of £110, which had been remitted to him by the testator in his lifetime.

Reis
v.
Executors of
Gilloway.

After deduction of the above sums and of the other debts indisputably due by the joint estate, the balance for division was stated to be Rds. 49,993 6 sk., one-half of which, Rds. 24,996 7 sk., was placed to the credit of the widow, as being her half of the joint estate, and as to the other half the following entry was made in the said account:—"The exact other half (called in the will the other half of the property) remains during the life of Mrs. the widow Gilloway, under the administration of the executors, the yearly interest of the capital being given and accounted for to her, and the capital sum devolving at her death to the brothers' and sisters' children of the late Mr. J. F. Gilloway, or their descendants.—Rds. 24,996 7 sk."

This account was not then signed either by the widow or the co-executors.

On the 1st of November, 1828, a letter, which bears the signature of the widow Gilloway and both her co-executors, was written *in German* to Mr. Ph. W. Gilloway, of Berlin, the brother of the deceased testator, and the father of the deceased C. F. A. Gilloway, informing him of his brother's death,—of the contents of his will,—that the said legacies and bequests of £1,000, £8,000, £20,000, and £50,000 had been charged against the joint estate, and that the widow was to have, 1st, "all the plate and part of the furniture. 2dly. The net one-half share or moiety of the property (after deduction of the aforesaid legacies), which, according to the laws of this colony, tacitly and of itself belongs to the widow. 3dly. The life-rent of the other moiety of the property (being the separate property of the deceased). After the death of the widow Gilloway this said separate or private moiety is to devolve on the brothers' and sisters' children of the deceased." And that the balance of the £50,000 devolving on him as the heir of his son, C. F. A. Gilloway, had been paid into the Orphan Chamber on his account.

On the 9th December, 1828, in consequence of additional assets belonging to the estate, to the amount of Rds. 207 7 sk., having been recovered, a farther liquidation account, referring to the former, was framed by the defendants, the co-executors, at the foot of the former, to which it referred, distributing those assets between the widow and the deceased's brothers and sisters, as in the preceding account.

On the said 9th of December, 1828, an account was framed by the defendants, the co-executors, between the widow and

Reis
v.
Executors of
Gilloway.

the executors of her husband, in which she was credited with Rds. 25,100 6 sk. 3 st., as being the net half of the joint estate of herself and deceased husband, as appearing from the liquidation accounts of 1st November and 9th December, 1828, and with Rds. 1431 5 sk. 4 st., as her one-third share of the per centage due to the executors, and debited with the amount of the price of certain property belonging to the joint estate, purchased by her, and of certain bonds and securities, which had been assigned and delivered to her, and a balance was thus brought out against her of Rds. 306 7 sk. 1 st.

On the same day an account was framed by the defendants, the co-executors, between the heirs appointed by Gilloway in his will and his executors, in which the heirs were in like manner credited with Rds. 25,100 6 sk. 3 st., as being the net half of the joint estate devolving to them under the deceased's will, subject to a life-rent in favour of the widow.

The account of the 1st November, 1828, was not signed by the defendants, the co-executors, but that of the 9th December, 1828, thereto referring and subjoined, as also the accounts between the executors and the widow, and the executors and the heirs, were all signed by them, and admitted to have been so on the 9th December, 1882.

All the four accounts were signed by the widow, and, it was admitted, had been signed by her at some one time subsequent to the 9th December, 1828.

It was admitted that previously to the said 9th December, if not to the 1st November, 1828, a question had been raised by the widow as to the right of the co-executors, to charge the sums above-mentioned against the joint estate of herself and deceased husband, instead of against his separate estate, and that she had taken the opinion of counsel thereon.

It was alleged by the defendants that she had signed the four accounts in January or February, 1829, *after she had taken the opinions of two counsel and found they differed*, in consequence of which difference of opinion she consented that the said four sums should be deducted from the joint estate, and by affixing her signature to the accounts, approved of the distribution therein contained. There was no evidence in support of this allegation, except a statement to that effect contained in an affidavit, sworn by the defendants, Zeederberg and Rimrod, in the course of the proceedings in the case, which affidavit at the trial was tendered by the plaintiff, and allowed by the Court, to be put in evidence, but only as evidence against those two defendants in so far as their interest was concerned, and not against their co-defendants.

By the plaintiff it was alleged that the widow had signed the four accounts only as an acknowledgment by her, as one of the co-executors, that the estate had been administered in

the manner therein set forth, and not as an approval of, or consent to, the deduction of those four sums from the joint estate, and only on condition that she might take the opinions of lawyers as to the correctness, in law, of this proceeding, and thereafter act accordingly

Reis
v.
Executors of
Gilloway.

In support of this allegation, there was no evidence adduced, except the fact that at the foot of each of the three accounts dated 9th December, there had been inserted by the defendants, the co-executors, a clause, to the following effect:—"I declare that I have strictly examined, as jointly instituted heir of my late spouse, the above account of the estate, and compared the vouchers relative thereto, and found the same to agree in all respects, and that I have received in consequence thereof my inheritance and my share of the estate, acquitting and discharging Mr. R. A. Zeederberg from all further demands on account thereof, with promise of indemnification and under obligation according to law," which it was their wish and intention should be signed by the widow, *which however had not been signed by her*, she having, as the plaintiff alleged, refused to do so, in order that she might not thereby be foreclosed from trying the question as to the legal right to deduct the four sums aforesaid from the joint estate.

No steps were, however, at any time afterwards taken by the widow in her lifetime to have the liquidation account and distribution of the joint estate of herself and her deceased husband altered or amended as to any of the four above-mentioned sums. On the contrary, she continued annually to receive from the co-executors the sum of Rds. 1506, being the interest on Rds. 25,100, the moiety of the joint estate awarded to the heirs of her deceased husband, in the accounts dated 1st November and 9th December, 1809, to the whole (instead of only the half) of which interest she was supposed to be entitled under her husband's will; and four receipts each for the said sum of Rds. 1506, respectively dated October, 1829, 1830, 1831, 1832, signed by her, were put in evidence at the trial.

In May, 1833, the widow died, having previously appointed the plaintiff to be the executor of her estate, and the guardian of his minor son, the latter of whom she had appointed to be her sole and universal heir.

In June, 1833, the plaintiff brought this action against the defendants, the executors of Gilloway, in which he prayed that they should be condemned to amend the account rendered by them of the joint estate of Gilloway and his wife, Luyt, and to charge the estate of the said Gilloway, solely, with the sums of *f*1,000, *f*8,000, *f*20,000, and Rds. 15,200, being the balance of the *f*50,000 still due to the representatives of the deceased C. F. A. Gilloway; and farther, that they should

Reis
v.
Executors of
Gilloway.

be condemned to account for the sum of Rds. 1,000, being the amount of a bond due by one Wolhuter to Gilloway, not accounted for by the defendants.

After the declaration had been filed, the other defendants, being the heirs of Gilloway, were allowed to intervene as defendants.

At the trial, all the facts above-mentioned were proved. The plaintiff's counsel proposed to call the plaintiff, as being only the nominal plaintiff, the defendants' counsel proposed to call the defendant Zeederberg, as being only a nominal defendant, as witnesses, but the Court sustained the objection made to both of them that they were respectively liable for costs.

J. C. Berrangé was called by the plaintiff to prove the signatures of certain documents, which the plaintiff had obtained leave to add to his schedules, but which, after obtaining such leave he had omitted to add.

The Court refused to allow those documents to be now produced.

Defendants called—

Hendrik Wolhuter, who stated,—“I was indebted to my uncle, the late Mr. Gilloway, in Rds. 1,000. I am still indebted to his estate in this sum. I have not paid it, because on the day after my uncle's death his widow told me that my uncle had told his executor Rimrod to leave the money with me (*te laten by my*). I was in the habit of purchasing corn for my uncle on the market. He told me he would remember me in his will.”

Defendants tendered the oath of Rimrod that old Gilloway on his death-bed had desired his widow to destroy Wolhuter's bond, and that the only reason why it was not destroyed was, that on being searched for, it could not be found until two years after Gilloway's death.

✓ The Attorney-General and Cloete were then heard on the part of the plaintiff. (The Court held that they were not precluded by the 131st rule from hearing two counsel, when the case was of such a nature as to make it expedient to do so, which they considered this to be.)

They maintained, 1st, that the widow Gilloway, if she had been alive, would not have been barred from bringing this action by having signed the accounts, or by anything else she had done after her husband's death, and that the plaintiff was entitled now to have the account amended in the same way that the widow would have been on the 1st November, 1828.

They gave up all claim on account of the legacy of £1,000 to the Lutheran poor. They maintained that the £8,000 to the godchildren was clearly *a legacy* left by the testator and nothing else, and therefore, both from its nature and from the

terms of the will of 1822, by which it must be held to have been bequeathed, it was clear that it was due out of the testator's separate estate, and not out of the joint estate.

Reis
v.
Executors of
Gilloway.

They maintained that the deed referred to in the clause, in will of 1822, which excepts from the previous general revocation "the legacies and bequests as he has made jointly with his aforesaid late first wife, or separately, and by a further disposition *made by virtue of the reservatory clause*," was the deed dated 4th November, 1813, executed by Gilloway and his first wife in virtue of the reservatory clause in their will of 1809, and not the codicillary disposition of the 10th December, 1819, made by him and his second wife in virtue of the reservatory clause in their will of December, 1818,—and consequently that the said codicillary disposition of the 10th December, 1819, was completely revoked and annulled (and so the Court held).

They admitted that the disposition of the £50,000 in favour of his nephew was a *donatio inter vivos* and not a legacy *mortis causa*, and irrevocable by Gilloway, at least after his nephew's death, and consequently was a debt due by him, and consequently, during the subsistence of the marriage, a debt due by the joint estate.

They did not seriously maintain that the legacy of £20,000 had not, by Gilloway's subsequent transactions with Mrs. Leibbrandt, been made a debt due by him, and consequently by the joint estate during the subsistence of the marriage, not only as to the £10,000, payable out of the first Mrs. Gilloway's estate, but as to the other £10,000 which was originally a legacy bequeathed by Gilloway out of his own estate.

But they maintained that although those two debts, if they had been due and demandable during the subsistence of the marriage, would have been debts on, recoverable from, and payable out of, the joint estate, yet that having been debts contracted by the husband before his marriage, they, after the dissolution of the marriage by his death, ceased to be debts against the joint estate, and became due by, and chargeable against the separate estate of the original debtor, the deceased husband, and quoted Van Leeuwen's Roman-Dutch Law, pp. 412, 525; Van Leeuwen's Cens. For., b. 4, c. 23, § 21; Van der Keessel, Thes. 224; Grotius 2: 11, 12; Loenius Cas. 99, and *Cleenwerk v. Bergh*, 20th December, 1832.

They farther maintained that although it might be considered that there was evidence to show that Gilloway intended or wished that Wolhuter's bond should be discharged, there was no evidence that his widow had ever consented to this being done.

Brand, for the defendants, argued *contra*, and *inter alia* maintained that even although the sums in question ought

Reis
v.
Executors of
Gilloway.

not to have been charged against the joint estate, the widow (and consequently her representative) would have been barred *transactione* from now opening up the liquidation account and seeking to have it amended.

He maintained that the circumstances of the case of *Cleenwerk v. Bergh* were different from those of the present case,—that supposing that the deed signed by Cleenwerk, the son in that case, should be held to have been anything more than an acknowledgment of having received the sum therein mentioned, still it was evident that he had signed it in ignorance that he had a legal right to more than the one-half of his mother's half of the joint estate;—but here the widow was well informed as to the uncertainty of the matter in dispute, and yet not only took no steps in her lifetime to have the liquidation account altered, but signed the accounts, and for four years afterwards homologated and took advantage of the liquidation accounts by annually receiving from the defendants, the interest of the whole of the deceased's half of the joint estate, which was erroneously awarded to her in the liquidation account, instead of the interest on only the half of deceased's half, which was all that was legally due to her.

He maintained that all the authorities founded on by the plaintiff were founded on the case quoted from Loenius, which was not decided on any general law, but proceeded on local statutes and the particular circumstances of that case (*vide* Neostad. Observ. de Pactis Ante-nuptial, No. 12, p. 40); that both the £20,000 and £50,000 being debts due by the joint estate, were chargeable against it after the dissolution by the death of the husband, notwithstanding they had been debts due by him before the marriage, and quoted Grotius 2: 11, 12; Voet 23: 2, 80: Van der Linden's Inst., b. 1, c. 3, § 8; Bynkershoek Quæst. Jur. Priv., lib. 2, c. 2.

[*Cur. Adv. Vult.*]

Postea (31st December, 1834).—Judgment was given, when the Chief Justice and Kekewich, J., held that the widow would not have been barred by anything she had done, from now objecting to the distribution account, and having her share of new determined according to law,—that the fact of legal opinions having been taken by her, shows that she acted not upon her own will and consent, but under an impression of legal necessity,—that she had done nothing but as co-executrix,—she made no gift or took any burden on her estate. She refused to sign an acquittance of her co-executors as sought to be noted on the liquidation account. They further held that the executors having paid her more than she could legally take under the will could receive back from her the amount erroneously paid, and still execute the will as it ought to have been done.

Menzies, J., held that the widow would now have been (and consequently her heir was) barred from objecting to the liquidation account, and insisting that it should be amended as now sought by plaintiff.

Reids
v.
Executors of
Gilloway.

He attached no weight to the widow's signature to the letter of 1st November, 1828. It did not appear that when she signed it she was aware of the question as to the proper mode of charging the sums in question against the joint estate or the separate estate of her husband, besides it was written in German, and there is no evidence that it was sufficiently explained to her before signature.

But it had been admitted on both sides that when she signed the liquidation account and the accounts between the heirs and the executors, and that between herself and the executors, whether she signed them in December, 1828, or in January, or February, 1829, she was fully aware of the question as to which estate those sums should be charged against.

If she signed them in January or February, as alleged by the defendants, then she did so after she had taken the opinion of counsel, and must be held to have been fully advised and informed, not only on this question, but as to whether she was entitled to a liferent on one-half or on the whole of the separate estate of her husband, and by then signing the accounts, and thereafter continuing to receive the interest as it had been awarded to her in the liquidation account, and in that between the heirs and the executors, she must be held deliberately to have made up her mind to accept and stand by the distribution of the estate made in the liquidation account, rather than, by questioning it in some points which were doubtful, to run the risk of not only having those points decided against her, but also losing the liferent of one-half of her husband's separate estate. If on the other hand she should (as alleged by the plaintiff) be held to have signed the accounts in December, 1828, under a reservation that she should be at liberty to consult lawyers and thereafter act accordingly, seeing it is admitted that she did then consult lawyers, the same legal presumptions and consequences, as above set forth, follow from the fact, that, after obtaining the opinion of lawyers, she for upwards of four years took no proceedings whatever for having the distribution account altered or amended, but on the contrary, homologated and adopted it by receiving the interest, as erroneously awarded in that account, annually, and granting written receipts for the same.

He attached no weight whatever to the fact of her having refused to sign the acquittances at the foot of the then accounts. Those acquittances contained no approval of, or consent to, the mode in which the joint estate had been distributed.

Reis
v.
Executors of
Gilloway.

Zeederberg had been the administering executor, and those acquittances contained nothing more than acquittance and discharge to him, which for many reasons she might be unwilling then to give, even if she had, in the most solemn and deliberate manner approved of the principle and mode, according to which the sums in question had been charged on the joint estate; while it appeared to him impossible to hold that her signature to the three accounts, and particularly to that between herself as widow and the executors, in which certain assets are awarded to her as the portion of the joint estate, to which she was entitled, and in which a balance is brought out against her, and consequently by her signature acknowledged to be justly charged to her debit,—should not be held as an approval of, and consent by her to, the distribution contained in those accounts. Unless, indeed, her signature were held to have been affixed under a declared reservation, but even if it were so, it had been already shown that by her subsequent conduct she had afterwards tacitly but completely discharged and renounced the benefit of that reservation.

On the supposition that the liquidation account could now be opened up by the Court and amended, the Court unanimously held, 1st, that the legacy of £8,000 to Gilloway's godchildren was simply a legacy strictly so called, bequeathed by him, and consequently a burden only on his separate estate; and 2dly, that although the £20,000 to the children of Mrs. Leibbrandt were held to have been a debt due by the joint estate, and as such might, by law, be chargeable against it, yet that by the terms made use of by the testator, in his will of 1822, "expressly desiring that the same may be strictly observed and performed *by his* testamentary executors," he had effectually provided that it should be paid out of his separate estate, and not out of the joint estate.

The Court also held unanimously that the £20,000 and the £50,000 were debts due by Gilloway before he entered on his second marriage with J. J. Luyt, and consequently, during the subsistence of the marriage, were debts due by the joint estate in communion between the spouses. But the Chief Justice and Kekewich, J., held, in respect of the authorities quoted by the plaintiff, that both those debts, and more particularly that of £50,000, which was not payable till after Gilloway's death, ceased, in consequence of the dissolution of the marriage by his death, to be a joint debt, and became chargeable on, and demandable from only the separate estate of Gilloway, the original debtor.

Menzies, J., held, that considering the views taken by all the authors quoted by the plaintiff as to the principles on which this question as to the effect of the dissolution of the

marriage should be decided,—that their *dicta* in favour of the plaintiff's case were rested solely on the authority of the case reported by Loenius; and that there was reason for believing that the decision in that case was given in respect of local statutes and of the special circumstances of the case;—it was at least doubtful whether, notwithstanding the dissolution of the marriage by death, debts contracted by one of the spouses before the marriage did not continue to be joint debts, in the same way as debts contracted during the marriage; but that at all events it was clear from the authority of Voet 23 : 2, 80, “*Eos, qui soluto matrimonio in solidum de tali (i.e. ante nuptias contracto) ære alieno conventi atque condemnati fuerint, pro semisse regressum habituros esse adversus alterum conjugem vel heredes ejus, adeoque communionem adhuc cum effectu dimidiati æris alieni damnum allaturum,*” consequently in the present case, which was truly a question between the heirs of a deceased spouse and the surviving spouse, the debts in question, although they had been contracted by the deceased before marriage, ought to be deducted from, and paid out of, the joint estate, before it was divided between his heirs and the survivor.

Reis
v.
Executors of
Gilloway.

The Court held unanimously that although it appears that Gilloway never intended to enforce the bond against Wolhuter, it still remained a debt due to the joint estate, and as such must be brought to account by the executors, however they may think fit to dispose of the deceased's half share of its amount.

The judgment of the Court was, that the defendants do amend the liquidation account by charging the sums of f8,000, f20,000, and Rds. 15,200, the balance remaining due of the f50,000, against the separate estate of Gilloway, by crediting the joint estate with Wolhuter's bond, and debiting the separate estate of the widow and her heir with four years' interest on one-half of what shall be ascertained by the amended account to be the net share of the joint estate devolving on Gilloway's heirs, and which had been erroneously paid to the widow.

All costs to be paid out of the joint estate.

This day (3d February, 1835), Brand, for sundry persons, being heirs under the estate of the late Jan F. Gilloway, deceased, who had in that capacity been some of the co-defendants in the suit, moved for leave to appeal.

Cloete, for Reis, opposed this, on the ground that the interest of the applicants in the suit did not amount to £500.

The Court overruled this objection on the ground that the sum at issue, in respect of which the judgment sought to be appealed against had been given and pronounced, was above £500, and that therefore the applicants, without reference to

Reis
v.
Executors of
Gilloway.

the amount of their individual interests in the suit, might appeal. The sum of £500 was fixed on in the charter only as a criterion of the importance of the suit.

The question was mooted by the Chief Justice whether some of the several plaintiffs or defendants to a suit could appeal, unless all their co-plaintiffs or co-defendants joined in the appeal; but this point was not pressed to a decision by him, and was not urged by the respondent, it being admitted at the bar, on both sides, that by the Dutch law any one of a number of parties to a suit might appeal without the concurrence of the others.

Thereafter, on the application of the respondent, the Court, by consent, ordered that the sum in dispute remain in the hands of the executors until the decision of the appeal or the further order of the Court, they paying the interest to the respondent on his finding security for the same.

5. LANDSBERG v. MARCHAND.

[9th December, 1834.]

Where a Woman, married out of Community, is sued, it is necessary that the Summons be served also on the Husband.

Landsberg
v.
Marchand.

In this case, in which the plaintiff claimed provisional sentence, the summons ran thus:—

“Command J. D. Marchand of Wale-street, Cape Town, if need be assisted by her husband, B. Marchand, that justly and without delay she render, &c., and unless she shall do so, then summon the said J. D. Marchand, that she appear,” &c.

The summons had been served personally on the wife, and had not been served on the husband.

The Court dismissed the case, in respect that the summons had not been served on the husband.

They held that regularly the husband ought also personally to have been called in the summons; but they did not decide what would have been the effect of service of summons on the husband, if he had not been personally called, and an objection had been founded thereon; but in a previous case on the same day, in which the summons against the same defendant commanded the sheriff to summon her “assisted as aforesaid” (*i.e.* by her husband), and had been duly served on the husband as well as on the wife, the Court gave provisional sentence; no appearance having been made by either husband or wife.

6. GRAY v. SPENGLER.

[28th November, 1835.]

Where the Wife, married out of Community, had obtained a Rule "Nisi," calling on her Husband to assist her in appearing to and defending an Action commenced against her, the Court declined, in the particular case, to make the Rule absolute.

On the 11th of November, 1835, Joseph Day sued out and caused to be served on S. D. Gray, the wife of J. J. Spengler, a summons to the effect following:—

Gray
v.
Spengler.

"Command S. D. Gray, wife of J. J. Spengler, that she receive, on behalf of her minor daughter, E. D. Davy, transfer of a house, &c., purchased by the said S. D. Gray, assisted by her said husband, in her capacity as guardian for her said minor daughter, E. D. Davy; and upon receiving the said transfer to take over a mortgage bond due by the said plaintiff to the Orphan Chamber, for £16,000, &c., and to pass a mortgage bond over the said house, &c., in favour of the said plaintiff, for £29,000, being the remainder of the price stipulated for the purchase of said house, &c., in compliance with the notarial deed, passed before the notary Buissonne and witnesses, dated the 9th January, 1835."

In consequence of this summons so served on her, Mrs. Spengler made the following affidavit:—

"Sarah Dorothea Gray, the above-named defendant, maketh oath and saith that she was married to the above-named Jacobus Johs. Spengler, on or about the month of November, 1834, and that previous to her marriage with the said J. J. Spengler, he executed a notarial deed, whereby he relinquished all right, title, and pretension to all the estate, which she then possessed, or might possess, that she is now, and hath for upwards of eleven years, lived apart from her said husband. And this deponent further saith that a summons, copy whereof is hereunto annexed, hath been served upon her, this deponent, whereby she, assisted and represented by her said husband, the said J. J. Spengler, is commanded, in her capacity as mother and guardian of Elizabeth Dorothea Davy, a minor, to appear before the registrar of deeds, and there, for and on behalf of the said E. D. Davy, to receive from J. Day, now of the village of Stellenbosch, legal transfer of a certain house and premises,—that this deponent believes she has good grounds to defend the said action, and hath for that purpose required her said husband, the said

Gray
v.
Spengler.

J. J. Spengler, to assist her to defend the same, and that the said J. J. Spengler hath refused so to do.

“D. SPENGLER.

“Sworn at Cape Town,
this 19th day of November, 1835.”

And in respect of it obtained a rule *nisi* calling on Spengler, her husband, to show cause why he should not appear to the action instituted against her by the said summons, and take up the proceedings according to law.

This day the Attorney-General, for Mrs. Spengler, moved that the said rule be made absolute, and produced the ante-nuptial contract, referred to in the said affidavit.

By this contract, which was dated 13th October, 1827, Spengler renounced and disclaimed for ever, all right, title, interest, and pretension whatsoever and of whatever kind and nature, which he, by virtue of the said intended marriage (*i.e.* between him and the said S. D. Gray), may otherwise have upon all such sums of money, goods, effects, and things whatsoever, nothing excepted, as may already, or that may hereafter either by way of succession, ab-intestato, last will and testament, *donatio ex causa mortis*, or by any codicillary or other act and deed whatsoever, come, be made, left or bequeathed as inheritance, legacy, or gift from the estate of Joseph Davy, now deceased, or from any other estate or person whatsoever, all which inheritances, goods, effects, gifts, legacies, and sums of money shall for ever be and remain the sole, free, and exclusive property of the said S. D. Gray, the appearer (Spengler), leaving and relinquishing the whole and every part thereof to her, for her own and entire use and benefit, and with full and absolute power and authority to do and act with the same at pleasure, and in such manner as she may hereafter think fit and proper.

The Court,—without deciding whether, where an action was brought against a wife possessed of property reserved from the *communio*, and as to which the husband had renounced the *jus mariti* by ante-nuptial deed, the Court, on the application of the wife, ought to, or could, compel the husband to enter appearance for or in concurrence with his wife, or whether in such a case it was necessary to enable the action to be maintained against the wife, that he should have been summoned, or to entitle the wife to defend the action, that he should have entered appearance,—held that the circumstances of the present case, in so far as they had been laid before the Court, were not sufficient to support the application, or to warrant the Court to make an order on the husband, or to express any opinion as to what proceedings should be adopted either by the plaintiff, or by the defendant, or her husband, and discharged the rule.—No costs were allowed.

7. AUGUST *v.* RENS.

[5th May, 1836.]

The Evidence of a Wife, married after the Mahometan Ceremony, disallowed in favor of her Husband.

The plaintiff in this case was a Mahometan. In the course of the trial he called, as a witness, Maheeza, who was examined by Cloete, for the defendant, on the *voir dire*, and stated, "I am the wife of plaintiff. I was married to him according to the rites of the Mahometan church, by a priest, in the church, three years ago. I have lived with him ever since, and live with him now. He had no other married wife alive when I married him. He had no woman then living with him as his wife, although not married to him, in so far as I know. He has not married any other wife since. I have two children by him, the eldest is two years old."

August
v.
Rens.

Cross-examined by De Wet, for the plaintiff,—“There were no banns published previous to my marriage, that I know of. I did not go before the Commissioners or the Matrimonial Court. But the priest, as is the practice among our persuasion, gave notice in the church to the people, of our intended marriage, in the same way that is done in Christian churches. The notice is given only once, the day before the marriage. The priest now in Court was present at my marriage.”

Magadus sworn to make a true answer to the questions now to be put to him, “I am a Mahometan priest. I know August and Maheeza. I saw them married. They were married in the Mahometan church, according to the ceremonial of the Mahometan law. When a couple are going to be married, they come to their priest and ask him to marry them. The priest must then go to the chief priest and give him notice of it, and the chief priest causes all the priests to give notice of it in all the churches, in presence of the congregations, and to make inquiry whether the man or woman has been previously married, and if there are any objections to the marriage. The notice is never less than a week. I know that this was done. I myself heard notice of this marriage given between these parties previous to the marriage. In this case the notice was given, I think, two months previous to the marriage.”

Cloete, for the defendant, objected that, in terms of the 14th section of the Ordinance No. 72, this woman, being the wife of the plaintiff, was not admissible to give evidence in this case.

De Wet, for the plaintiff, maintained that the witness was admissible, inasmuch as she could not, in law, be considered

August
v.
Reus.

as the wife of the plaintiff, by reason of the following authorities,—Van der Linden, b. 1, c. 3, § 6, p. 82; Proclamation of 26th April, 1806.

The Court (Chief Justice absent on circuit) sustained the objection, and refused to allow the witness to be examined, but with liberty to the plaintiff, if the judgment of the Court should be given against him, afterwards to move the Court to have that judgment entered as a mere absolution from the instance, on the ground that by the decision given on this point he was prevented from now bringing forward evidence material to this case, and which, by law, he was entitled to give in support of his case.

8. ANDERSON v. MEYER AND OTHERS.

[11th August, 1836.]

Husband and Wife, being married out of Community, and the Wife's Estate having been, after her death, surrendered as Insolvent, the Court held that the Husband became a Creditor of the Wife for Interest on debts of hers, which Interest was paid by him during the Marriage, but had become due before the Marriage,—but that he did not become a Creditor for such Interest paid by him, which became due during the Marriage, the 4th clause of their Ante-nuptial Contract having given the Husband the sole disposal of all Dividends and Interest coming to the Wife from her separate Property, subject however to the payment of her just Debts, or the Interest thereof.—The Husband having claimed to be ranked as a Creditor for the amount of a Promissory Note, given by his Wife for Money borrowed for the repair of Houses, her separate Property, and alleged by him to have been paid by him,—the Court refused his oath, that he had made this payment to rebut the presumption that it had been paid out of her separate Estate.—The Husband further claiming for an amount of Costs which he had paid in an Action instituted against his Wife, and relating to her separate Property,—The Court held that this was a loss during the Marriage, which, under the 2d section of the Ante-nuptial Contract was to be borne only by the Husband.

Anderson
v.
Meyer and
Others.

The plaintiff married, in 1813, A. Berrange, widow of Dieleman. Previous to their marriage, on the 9th March, 1813, they executed a notarial ante-nuptial contract, which contained the following clauses:—

1st. "The appearers, towards the maintenance and support of their intended marriage, have agreed, the first (the plaintiff) to bring in from time to time such moneys and effects as may be necessary, and the second (the widow) to bring in all such goods, moneys and effects whatsoever, as she now hath, or is entitled to have, without any exception whatsoever, and of which an inventory is to be made on the back of a copy hereof, and shall be of the same effect as if inserted herein.

Anderson
v.
Meyer and
Others.

2dly. "That there shall be no community of property in the goods, moneys or effects, brought or to be brought into the marriage by the intended husband and wife, nor in any inheritance, donation, or legacy, which either of them may receive during the marriage, nor shall the intended wife participate in the profits or losses, which may accrue during the marriage, which, on the contrary, are to be wholly enjoyed or borne by the intended husband.

3dly. "The appearers shall not be responsible for the debts contracted by each other previous to the date of the marriage, nor shall their property be liable to execution for the same, but the debts so previously incurred shall be borne and paid by the party, by whom the same were contracted.

4thly. "The intended husband shall have the sole and entire management and disposition of the dividends or interest to arise from the property now possessed by the said intended wife, according to the before-mentioned inventory thereof, as also of all such as she may hereafter become entitled to by donation, inheritance, legacy, or otherwise howsoever, subject nevertheless to the payment of her just debts or the interest thereof, as the same shall become due, but shall not, without her counsel and approbation being previously had and obtained, have any right to alienate, mortgage, or burthen the property, which now doth, or shall, or may hereafter, belong to the said intended wife. He, the appearer, therefore, specially authorizing her to give such directions therein, as may, from time to time, be by her judged necessary."

The marriage subsisted for many years. After the death of Mrs. Anderson, her estate was surrendered as insolvent, and her surviving husband, the plaintiff, claimed to be allowed to rank on it as a creditor for an amount of £1,482 18s. 2½d.

Thereafter the several proceedings took place, which are narrated in the report of the case in *Re Anderson*. (Dieleman v. Anderson, 28th November, 1835.)

After which, the plaintiff brought the present action, in which he prayed that he might be adjudged to rank as a creditor in the insolvent estate of his deceased wife for that amount, but in which the Court ultimately gave judgment for the defendants, with costs.

Anderson
v.
Meyer and
Others.

In the course of the proceedings, the following questions were decided by the Court :—

1st. That the plaintiff was not entitled to claim on his wife's estate, for interest becoming due during the subsistence of the marriage, and that, by the 4th clause of the ante-nuptial contract, he was made personally liable for such interest, but that he was entitled to claim for interest on such debts, becoming due before the marriage, and paid by him after the marriage.

2dly. The plaintiff claimed Rds. 6,000, which he alleged he had paid in discharge of a promissory note, which had been granted by his wife to one Muller, for money, which she had borrowed to defray the expenses of repairing houses, belonging to the separate estate, possessed by her, out of community of property. The plaintiff produced the note, having this receipt written thereon—

“Contents hereof paid to me,

“JOHS. MULLER.”

The note and the receipt were admitted by the defendants.

Cloete, for the plaintiff, stated that, in consequence of Muller's death, he had no other proof that the payment had been made by him, and tendered his oath.

The Court held that the document produced, so far from being proof that the plaintiff had paid the Rds. 6,000, was *primâ facie* evidence that the payment had been made by the wife out of her own proper funds, refused the plaintiff's oath, and rejected his claim in respect of this item, as not proved.

3dly. The plaintiff claimed Rds. 729 1 sk., as and for costs paid by him in a suit, brought by one Horak against the plaintiff and his wife, for the transfer of a certain piece of land, belonging to the joint estate of herself and her first husband, Dieleman, and in support of this item, put in the record of the proceedings in the said suit, in which he, as defendant, had been condemned to pay the costs, repayment of which he now claimed from his wife's estate.

It was clearly proved by these proceedings, that this cause had related to a claim against the separate property of the wife.

The plaintiff failed to show that the proceedings in this suit had been taken by his wife's direction, or that they had been taken by the plaintiff beneficially for his wife.

The Court found that the plaintiff was personally liable for the costs in question, under the 2d clause of the ante-nuptial contract, as being a *loss* incurred; and, under the 4th clause, as being a just debt, contracted by the wife during the marriage, and without reference to whether the proceedings in the cause had been taken at the instance of the wife, or not, and without enquiring whether those proceedings had been *primâ facie* beneficial for the wife.

9. BRATH *v.* MULDER.

[19th August, 1836.]

Where an action is brought against the Husband in respect of Payment of Money to the Wife, it is necessary to allege that the Wife received the Money by the order and consent of the Husband.

The declaration in this case set forth, that the said plaintiff was indebted to Hester Neethling, widow of the late J. Pezo, in the sum of £37 10s., with the interest thereon from the 1st July, 1830, by a promissory note bearing date 1st July, 1830. And that in August, 1835, the defendant's present wife, Johanna Mulder, born Pezo, then being in the possession of the said promissory note, demanded payment of the said sum of £37 10s., with the interest due thereon, whereupon the said plaintiff paid over to the defendant's said wife, in discharge of the said capital sum and interest, the following sums, to wit:—

Brath
v.
Mulder.

In the month of August,	1835, the sum of	£3	0
Do.	September, 1835, the sum of	6	15
Do.	November, 1835, the sum of	2	5

being the total interest then due, and lastly, the plaintiff paid to the said defendant's wife, on the 7th November, 1835, the capital sum of £37 10s., when the said defendant's wife engaged and undertook to return to the said plaintiff, her promissory note of the 1st July, 1830, duly receipted, but that the defendant's said wife, and subsequently the defendant, hath refused to deliver up the said note, but on the contrary, the plaintiff had been required to pay the said sum and interest to the said Hester Neethling, who had not received the said sum.

Wherefore the plaintiff prayed that the defendant may be condemned to deliver up the said note, or to repay the above sums.

In his plea, the defendant pleaded, first, the general issue; and secondly, that at the time of the alleged payments, and the undertaking of the said defendant's wife, she was the legal wife of the said defendant, and could not, therefore, legally receive any payments, or enter into any undertaking or agreement, without the assistance or consent of her husband, the said defendant, whereby he, the said defendant, could become liable or bound towards the said plaintiff, and he tendered issue thereon to the said plaintiff.

In her replication, the plaintiff denied the allegations in the plea, and joined issue.

At the trial the plaintiff called—

Catherine Neiling.—I am plaintiff's daughter. I know that my mother was indebted to Mrs. Pezo Rds. 500, on a

Brath
v.
Mulder.

note. I recollect defendant calling on the plaintiff and saying he was very much in want of money, and asking her if she could pay him that debt. The plaintiff said she would. I think this was in the early part of November, 1835. The defendant's wife had spoken to my mother before. My mother said she had not the money then, but that she would draw the money out of the bank. My mother obtained the money by discounting a bill at the bank, and sent it the same day, or the day after, the defendant called, by her servant Manetje, to Mr. Mulder. The defendant called a few days afterwards and said he had received the money. My mother had been anxious to have back her note or a receipt, and not getting one sent to her. She had sent to the defendant to come and speak to her, and he then said he had received the money, but that he could not grant a receipt for it, as it was his wife's money.* My mother said she had been called on for the payment so suddenly, that she had no funds to retire the bill she had discounted; and he then said that he would lend her the money for that purpose, and she could repay him at her convenience. My mother had got the note after paying the 500 Rds., but there were four months' interest due on it, and my mother went with the note to call on the defendant to have this settled. She told me she had found the defendant out, and left the note with his wife, and next day I heard my mother send for the note.

Henry Le Sueur.—I am a clerk in the bank. A note of the plaintiff was discounted at the bank, on the 10th November, 1835. The money was paid to her servant Manetje.

Manetje.—I am a servant of Mrs. Brath. I remember last year going to the bank to get money for my mistress. I got from the bank Rds. 500, less the discount, and took it to my mistress, who made up the deficiency, and then by her desire I took it to Mrs. Mulder, and gave it to her. The money was in a box. She put it on the table, and asked me to leave the box. I told her it was the Rds. 500, which the plaintiff had sent. She told me to leave it as it was, until the defendant came home, and she would then give it to him. Two days afterwards I was sent to ask Mrs. Mulder for the note. She said it was mislaid, but that she would ask the defendant for it. Two days afterwards I went with a receipt for the money to be signed. Mrs. Mulder said she could not sign it, and sent me up to the defendant, and he said he could not sign it, and to take it to Mrs. Mulder.

In respect that neither the declaration nor the replication contained any allegation of facts sufficient to support the

* Mulder and his wife had executed an ante-nuptial contract, for which vide p. 162, *supra*.

conclusion as to the defendant's liability, in so far as it did not allege that the wife acted by the order or consent of the defendant, and that consequently the Court could not give effect to the evidence that the defendant's wife had demanded and received the payment by his order and consent, and that he had actually received the money from his wife,—the Court absolved the defendant from the instance, but without costs.

Brath
v.
Mulder.

10. MOLLE v. EXECUTORS OF VAN DEN BERG.

[29th May, 1840.]

A and B being married in Community of Property, A died, leaving his Property, after payment of his Debts, to certain Heirs appointed in his Will.—After his death, B, the wife, mortgaged Immoveable Property of the Joint Estate for Money lent after A's death, and the Mortgagee obtained Judgment against her for the amount and attached the Property:—whereupon, on Action brought by one of A's Heirs, the Court cancelled the Mortgage, as having been granted by the Widow "non habente potestatem," and quashed the Attachment.

C. Molle executed a joint will along with his second wife, A. S. Neyhoff, in which he directed all his landed property to be publicly sold, and the residue of the proceeds, after payment of his debts, to be divided among his heirs, therein named and appointed.

Molle
v.
Executors of
Van den Berg.

At his death, he was *inter alia* possessed of certain landed property at Wynberg, in the declaration described.

After his death, his widow appeared before the Registrar of Deeds on the 24th April, 1838, and then and there for the security of a sum of £250, advanced to her by J. van den Berg, now deceased, whose executors the defendants are, declared to bind specially as a mortgage the aforesaid landed property, forming part of the joint estate of herself and the testator.

Thereafter, on the 5th November, 1839, the defendants, as executors aforesaid, obtained judgment against the said widow, A. S. Neyhoff, for payment of the said sum of £250, and in execution of that judgment, attached the said landed property. Whereupon the plaintiff, in his capacity as one of the testamentary heirs of his deceased father, the testator, brought this action against the defendants, to have the said mortgage cancelled and set aside, as having been unlawfully granted by

Molle
v.
Executors of
Van den Berg.

the widow *non habente potestatem*, and to have the attachment of the said property, in satisfaction of the said judgment against the widow, and all that has followed therein, quashed with costs.

The plaintiff quoted Burge's Colonial Law, vol. 3, p. 170; Voet 20: 3, § 3.

The defendants made no defence.

The Court gave judgment for the plaintiff, as prayed, with costs.

11. BRINK v. LOUW, WIDOW OF NIEKERK.

[24th November, 1842.]

Where, during the Community, the Husband had entered into a Suretyship for which he became liable, and had afterwards surrendered his Estate as Insolvent,—the Court held that the surviving Widow could be sued for half the amount of the Suretyship.

Brink
v.
Louw, Widow
of Niekerk.

The following are the facts of this case, as admitted by the parties:—

In 1823, H. C. van Niekerk executed a mortgage bond for £750, in favour of Philip Rens, in which bond the plaintiff, J. N. van Niekerk the now deceased husband of the defendant, and three others, bound themselves as sureties *in solidum*, and joint principal debtors.

In 1827 the plaintiff was called upon to pay and did pay the said sum of £750 to Rens, from whom he obtained cession of action.

Thereafter, the principal debtor in the bond, surrendered his estate as insolvent, on which the plaintiff filed his claim in respect of said bond, but nothing was awarded to him thereon.

At the time the now deceased J. N. van Niekerk became surety to the said bond, he was married in community of property to the defendant, and during the subsistence of the said marriage, the deceased surrendered his estate as insolvent, and the plaintiff filed his claim thereon for £150, being one-fifth share of the said bond for £750, but nothing was awarded to him thereon, and said estate has not been released from sequestration.

After the surrender of his estate, the said J. N. van Niekerk died, leaving the defendant him surviving.

The defendant, neither at the time of the decease of her said husband, nor at any time since, received or possessed

herself of any part of the estate, which had at any time theretofore been enjoyed in community by her and her deceased husband, but had since his death acquired property of her own.

Brink
v.
Louw, Widow
of Niekerk.

Under these circumstances, the plaintiff in his declaration claimed from the defendant £75, being one-half of the £150 which at the time of the defendant's deceased husband's surrender of his estate and death, was a debt due by their joint estate, on the ground that on the death of her husband she had not duly repudiated and abandoned her interest in the joint estate.

This day, Cloete, for the plaintiff, quoted Van der Keessel, Thes. 93; Van Leeuwen Cens. For. b. 4, c. 23, § 8, 20; Grotius' Introd., b. 1, c. 5, § 22; b. 2, c. 11, § 18; Loenius Decis. Casus 99, p. 625; Voet 42: 3, 12; 23: 2, 52; and produced from the proceedings in the sequestrated estate of the late A. Fleck, which was sequestrated after his death, an act of repudiation by his widow: no sequestration or even voluntary trust having been made in his lifetime.

He maintained that neither the effect of the surrender of the joint estate by her husband, previously to his death, nor anything else, which had been since done by the defendant, was equivalent to such an abandonment of all interest in the joint estate, as is required by law, to free her from her liability for half the debts which had been contracted *stante matrimonio*, and that this is clear from the fact, that if the joint estate surrendered had either unexpectedly risen in value, or previously unknown assets had been discovered, so as to make the estate sufficient to pay all the debts, she would not now be barred from claiming her half of the surplus of said Estate.

The Attorney-General, *contra*, founded on the fact that previously to the dissolution of the marriage, which it was admitted took place in 1835, it had been ascertained and established by the liquidation of the sequestrated estate, and the decree of confirmation thereof by the Court, that there was no joint estate for the defendant to renounce, and that it would be sufficient to release the defendant from the liability for half the debts, that she should, if any new assets belonging to the joint estate, not previously known, should now be discovered, instantly on that fact coming to her knowledge renounce her share in them, and that it was not necessary for her release that she should, on the death of her husband, have renounced that which had then no existence, and which there was then no probability would ever exist, and quoted Van Leeuwen's Commentaries, p. 525; Burge's Colonial Law, vol. 1, p. 311, § 8; vol. 2, p. 152.

Cloete, in reply, quoted the Sequestrator's Instructions, § 43, and maintained that the sequestration reached and extended only to such property as was actually attached by the

Brink
v.
Louw, Widow
of Niekerk.

sequestrator at the time of the sequestration, or before the decree of confirmation of the sequestration account, and not to property which might accrue or be found to exist after the said decree, and therefore that the fact of the sequestration and confirmation of the liquidation account, affords no proof whatever that there was not a clear joint estate of Rds. 50,000 in existence at the time of the death of the husband.

The Court, on the grounds maintained by the plaintiff, gave judgment for the plaintiff, as prayed, with costs.

Holding that proof that there were no assets belonging to the joint estate, at the time of the dissolution of the marriage by the husband's death, had not, in law, the effect of releasing the wife from her liability, without a solemn legal renunciation by her, at the time of such dissolution, of all her interest in the joint estate.

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12. PAPPE v. HOME, EAGAR & CO. AND BAM'S
EXECUTOR.

[2d August, 1841.]

Where a woman at the time of her marriage in Community was entitled to an interest in a Trust Estate jointly with others, and after the dissolution of the Community by her Husband's death, she sold her share in the above interest,—then, if this interest ever legally came into the Community, what she sold as her share must be considered to be the half of her original share, the other half being then vested in her Husband's Executors,—if this interest did not legally come into the Community, then what she sold as her share must be the whole of the original share.

The Interest of a Wife, married in Community at the Cape of Good Hope, in a Trust Estate in real Property situated in England, must be regulated by the Law of England, and does not fall into the Community.

The Interest of a Wife married in Community at the Cape of Good Hope, in a Trust Estate in personal Property in England, must be regulated by the Law of the Cape of Good Hope, as the matrimonial domicile, and falls within the Community.

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

This action was brought by Dr. Pappe, of Cape Town, as husband and guardian of Mary Mestaer, his wife, against the firm of Home, Eagar, & Co., and Johannes Andries Bam, to recover a sum of £1445 1s. 2½d., being one-fourth share of the purchase-money of an interest to which she, in common with three other children of J. E. Mestaer, had become

entitled, by virtue of the will of their uncle, Peter Everett Mestaer, of London, deceased. It appeared from the declaration that the said Peter Everett Mestaer, being possessed of real and personal property to a considerable amount, left by will to a Mrs. Sarah Haworth, wife of John Haworth, of Congleton, in the county of Chester, for her own separate use, and independent of the control of her husband, his (the testator's) manor at Wanstead, known by the name of Oakhall, with all the furniture, plate, horses, and carriages thereto belonging; also, his house in New Broad-street, with all the plate, furniture, &c., thereunto belonging, and all the rents arising from the freehold, and copyhold, and other estates, amounting to £3,000 per annum; but in the event of these estates not yielding £3,000 per annum, the deficiency to be made good from the testator's personalties, which were to be lodged in government securities, for Mrs. Haworth's natural life, and at her decease, were to be held for the benefit of the children of Mr. J. E. Mestaer (of Cape Town) until they should arrive at the age of 21 years; and to be divided share and share alike. Mr. P. E. Mestaer, having departed this life without revoking or altering his will, thus left to Mary Mestaer, and the three other children of Mr. J. E. Mestaer, this reversionary interest.

Pappe
v.
Home, Eagar,
& Co.,
and Bam's
Executor.

The plaintiff alleged that he is now lawfully married to the said Mary Mestaer, his present wife, who was at the time of her marriage the widow of one Johannes Gregorius Bam, J. H. son, of Cape Town, to whom she had been married in community of property, and who departed this life on the 28th February, 1837, and that, after the said Mary had attained the age of 21 years, and after the death of Mr. Bam, her former husband, namely, upon the 4th April, 1837, she, together with the other parties interested in the reversion above-mentioned, authorized Messrs. Home, Eagar, & Co., of London, to sell to Mrs. Haworth, amongst other things, all her right and title to her share of that reversionary interest; which was accordingly purchased by Mrs. Haworth on the 7th October, 1839, for the sum of £6,500, which was paid by her to that firm, who duly transmitted it to be paid (after the deduction of certain expenses) to the children of the said J. E. Mestaer, or their legal representatives, in the shares and proportions to which they should respectively be entitled. The plaintiff therefore, in right of his wife, now claimed one-fourth part of the sum so received, which, deducting the expenses, amounted to £1,445 1s. 2½d., and which he had frequently demanded. Messrs. Home, Eagar, & Co., although they admitted that they had received the sum in question, had refused to pay it to the plaintiff or his wife, on the ground that it was claimed by the other defendant, Mr. J. A. Bam,

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

in his capacity as executor to the last will and testament of J. G. Bam, her former husband. This claim the plaintiff averred to be totally without foundation in law, and therefore prayed that the defendants, C. Home, E. Eagar, and R. Eagar might be decreed to pay the same, with the costs of this suit.

The defendants, Home, Eagar, & Co., admitted the receipt of the sum of £6,500 from Mrs. Haworth, as well as the truth of the several other matters of fact above-mentioned, and stated that they were ready and willing to pay the said sum of £1,445 ls. 2½d., to such person or persons as this Court should declare to be lawfully entitled thereto; but that they had hitherto declined to pay that sum to the plaintiff, in consequence of a conflicting claim thereto having been advanced by the defendant, Jan Andries Bam, as executor to his brother, which they were advised was valid in law.

The defendant, J. A. Bam, also admitted the truth of the matters of fact, above stated, but denied that the plaintiff was entitled, in right of his wife, to claim the sum in dispute, because the said Mary Mestaer was formerly, namely, on or about the 1st of May, 1836, lawfully married, in community of property, to his brother, J. G. Bam. That the interest which she took under the will was vested in her, immediately upon the death of the testator, and before her marriage to the said J. G. Bam; and that the sum now claimed by the plaintiff, her present husband, being the produce arising from the sale of that vested interest, belonged of right to the community of the former marriage, and ought to be paid to the defendant, J. A. Bam, in his capacity of executor to his brother's will. The defendant further pleaded, that, assuming that the interest in question was not absolutely vested in the said Mary Mestaer, immediately upon the death of the testator, but was liable to be divested by the contingency of her dying, either in the lifetime of Mrs. Haworth, or before the age of 21 years, the same was, under existing circumstances, no longer defeasible;—that on or about the 10th of August 1836, while the community of property, by marriage, existed, the said Mary Mestaer and the said J. G. Bam united with the other children of J. E. Mestaer in executing a power of attorney, authorizing Home, Eagar, & Co., to sell their respective interests under the will, to the best advantage; that Home, Eagar, & Co., under that power of attorney, when the said community still existed, entered into articles of agreement with Mrs. Haworth, for the sale of the said respective interests; that the said Mary Mestaer and the other children of J. E. Mestaer, afterwards, by a deed of the 14th July, 1838, duly ratified and confirmed those articles of agreement, and authorized Home, Eagar, & Co., to carry the agreement

into effect ;—and that the sum claimed by the plaintiff is the produce arising from the interest of the said Mary Mestaer, which was agreed to be sold to Mrs. Haworth, under that power of attorney. Wherefore he prayed that the claim of the plaintiff might be rejected, with costs ; and that he, the defendant, might be declared to be entitled to receive the said sum of £1445 1s. 2½d., to be by him, in his said capacity, administered, according to law.

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

The Attorney-General and Cloete appeared for the plaintiff, and Musgrave and Brand, for the defendant.

The Attorney-General maintained that although the power of attorney was executed in the lifetime of Bam, and therefore during the existence of the community, yet, that the articles of sale not having been signed until after Bam's death, could have no effect in bringing anything under the community between Bam and Mary Mestaer, which was not in it the day before Bam's death. He argued that the estate which Mary took under the will was a trust estate in real property, and not a legal estate in that property. To maintain this position he quoted 27th Henry VIII. c. 10, "the Statute of Uses," and "Hayes' Introduction to Conveyancing,"—and contended that the executors,—by the words in the will, "to be held for the benefit of the children and until they shall arrive at the age of 21 years,"—held an active trust ; and therefore the legal estate was vested in them, and only a trust estate in the children ; and that the same is the case with Mrs. Haworth's life interest, in consequence of the devise being for her own and separate use, independent of her husband, she being a married woman at the time. He maintained also, that the attainment of the age of 21 by the child, did not convert the trust into a legal estate, and gave the child only a right, by equitable proceedings, to compel the trustee to convey the legal estate to him. In support of this view he referred to Hayes' Introduction, chap. II. ; and maintained that if Mary Mestaer had been an English girl, and had died two days after she attained the age of 21 years, leaving a son and two daughters, the trust estate which she had, would devolve on her son, as being a trust estate in real property, and would not be divisible among her daughters as forming part of her personal estate. He maintained further, that, if she had been an English girl, and had died two days after she had attained the age of 21 years, leaving a husband, he would have been entitled to the courtesy of the real property held in trust, although, in the converse case, a wife would not have been entitled to dower. [Lord Stair, 4: 6, § 2.] He maintained also, that by the law of England, if a trust estate in real property had devolved on an English wife, during her coverture, her husband, merely in respect of such devolution, would,

Pappe
v.
Home, Ezar,
& Co.
and Bam's
Executor.

during the continuation of the coverture, have had no right in it except as administrator of his wife's estate; and would have acquired no right or interest which on his death would pass to his heir. [Burton on the Law of Real Property, §§ 1360 and 1361.] He contended that the interest vested in Mary Mestaer by the will, being a trust estate in real property, the question as to how far that estate was affected by her marriage, and as to what right her husband, Bam, acquired to it in virtue of the marriage in community, must be decided by the *lex rei sitae*, namely, England. [Story's Conflict of Laws, §§ 152, 157; Burge, vol. 1, p. 617, *et seq.*; Van der Linden, b. 1, c. 3, § 8, p. 87; Voet, 23: 2, § 71.] He further maintained, that no change had taken place in the nature of Mary's estate before the community was dissolved by the death of Bam; and particularly, that the execution of the power of attorney had no such effect.

Cloete followed on the same side, and maintained that this question must be decided by English law; and quoted Voet, 23: 2, § 25; Burge, vol. 1, § 8, pp. 599-626; and Van der Keessel, Theses 27, 28. He also maintained, that, even if the trust property had been situated here, and had been placed under trust by a deed executed here, and in the same terms with those of the will, that the interest Mary Mestaer would have acquired under that deed, would not have fallen under the community. [Voet, 23: 2, §§ 71, 72, 77; 1 Burge, 276, *seqq.*]

Postea (4th June, 1841.)—Musgrave, for the defendant, contended, that under the provisions of Mr. P. E. Mestaer's will, the trustees were not only empowered, but directed and bound to sell the two houses named in the will, and all the freehold and copyhold estates, and to vest, in government securities, the proceeds, or so much thereof as should produce £3000 a year, or, if the proceeds were insufficient to do this, then the said proceeds and as much of her personalties as were required to supply the deficiency in the £3000 for the use of Mrs. Haworth, during her life, and after her death for the use of her children until they should arrive at the age of twenty-one years: and therefore, that the property vested in the trustees was an estate in personal property. He quoted Burge, 4, p. 569, to show that such a trust gave a vested interest in all the children of Mestaer, who were *in esse* at the death of the testator; and Blackstone, 2d book, c. 3, § 10, to show that rents are incorporeal, and therefore personalty in England. He further argued that in England, where parties married without contract, a legacy or personal estate devolving on the wife during the coverture, if not reduced into his possession by the husband, by exercising some act of ownership actually or constructively, on the death of the husband,

remains to the wife, and does not go to his executors, though the contrary is the case, where, by a previous marriage settlement, such acquisitions of the wife during the marriage are given to the husband. He maintained that the community of property established by law in this colony, must produce an equivalent to ante-nuptial settlement in England. And further, that the power of attorney, executed by Bam, and signed by his wife, was such an act of ownership as brought the wife's interest in the joint estate under the community; more especially as the attorneys, in virtue of that power, afterwards entered into the articles of sale of the 4th April, 1837, although the husband died in February previously. He also maintained that Mrs. Bam, by signing the inventory of the joint estate of her and her deceased husband, in which is inserted the bequest of the testator to his brother's child, affirmed the act of ownership, namely, the power of attorney by which it was brought into community.

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

Brand followed on the same side, and quoted Voet, 23 : 2, § 84, to show that if the trust property were personal property, and so taken out of the operation of the law of England, or if the husband, by the law of England, would, if it had devolved to the wife during the coverture or before it, have been entitled to it, then, by the law of this colony, it would fall under the community. [Henry's Foreign Law, p. 37; Proclamation, 12th July, 1832.]

The Attorney-General replied, and Musgrave rejoined.

Judgment deferred.

Postea (2d August, 1841).—The Chief Justice read the judgment of the Court as follows:—

This case has been very ably argued by both parties, according to the view which both have taken as to what is the question which the Court has now to decide. But it appears to the Court, that both parties have been in error, as to what the question for the determination of the Court actually is.

It has been taken for granted by both, and as it appears to the Court most erroneously, that the funds in possession of Home and Eagar, as to which the Court is now to adjudicate, must be considered as if they were the proceeds of, or were derived from, or represented, the property, which by the will of Peter E. Mestaer was vested in the trustees therein appointed, for the use of the children of his brother John E. Mestaer; and must therefore be disposed of by this Court, in the same way in which the Court of Chancery, or other competent Court in England, would have disposed of them, had no sale of any part of them to Mrs. Haworth taken place,—and Mrs. Pappe and the executor of her deceased husband, Bam, had brought the question at issue between them under the decision of such English Court.

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

Whereas, in truth, the funds in possession of Home and Eagar are neither the proceeds of, nor are derived from, nor in any wise represent, any part of the property of Peter Mestaer, and are nothing else except a certain sum of money, which Mrs. Haworth has paid out of her own pocket, in consideration of Mrs. Pappe having sold and made over to Mrs. Haworth her, Mrs. Pappe's share (whatever that may have been at the time of such sale) in the property vested by Peter Mestaer in trustees, for the use of the children of his brother John.

It is therefore unnecessary to decide, whether, by the law of England or of this colony, the share, which under her uncle Peter's will devolved to Mrs. Pappe, fell under the communion of goods between her and her deceased husband, Bam, and whether her said husband's executor is, or is not, in respect of such community, entitled to claim one-half of what was originally Mrs. Pappe's share in her uncle's property.

Because, if the property which Peter Mestaer vested in trustees for the use of his brother John's children, was of such a nature that by the law of England or of this colony, (by whichever law of the two that question ought to be decided), her share of or in it, did not fall under the communion of goods between her and her husband, Bam, and on his death was not liable to be divided between Mrs. Pappe and her said husband's heir or executor, then this heir or executor cannot possibly have any right to any portion of the funds in the possession of Home and Eagar, which are nothing else than the price paid by Mrs. Haworth, from her own funds, in consideration of Mrs. Pappe selling to her that share in her uncle's trust property, to and in which, in the case supposed, she had the sole and exclusive right and interest.

And if, on the other hand, Mrs. Pappe's original share in the trust property, did, by the law of the country by which that question ought to be decided, fall under the communion of goods between her and her first husband, and on his death became divisible, so that only one-half of it remained her property, and the other half of it devolved to her husband's executor,—then it is clear, that after the dissolution of the community by his death, she could alienate by sale or otherwise *only* her own half of her original share, and could not by any deed of alienation, either in the form of sale, or in any other conceivable form, divest her first husband's, Bam's, executor of, and convey to Mrs. Haworth or any other person, that half of her original share which, in consequence of such share having fallen under the communion, did, on Bam's death, devolve to his executor. Consequently this last-mentioned half still remains vested in Bam's executor, and the funds in dispute being the price paid by Mrs. Haworth in consideration

of the sale to her by Mrs. Pappe, of that share which, at the time of the sale belonged to, and was subject to, the disposal of Mrs. Pappe, viz., the one-half of her original share, has no connection with or relation to the other half of her original share, which after her husband's death never belonged to her, or was subject to her disposal or could be alienated by her; and which, notwithstanding any deed which Mrs. Pappe may have executed in favour of Mrs. Haworth, is still held by Peter Mestaer's trustees for the use and benefit of Bam's executor or representative, until the death of Mrs. Haworth, when such executor or representative will be entitled to demand it from the said trustees.

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

If Mrs. Pappe, at the time she sold, or made the sale of her share to Mrs. Haworth, was the sole and exclusive proprietor of the whole of what was her original share in her uncle's property, then she sold and conveyed nothing except what was exclusively hers; and the price paid by Mrs. Haworth to Home and Eagar being only the price of what was the sole and exclusive property of Mrs. Pappe, must belong to her exclusively, and her husband's executor can have no claim to any portion of it.

If at the time of the sale of Mrs. Haworth, only one-half of her original share belonged to her, and the other half to Bam's executor, then she sold and conveyed, and Mrs. Haworth bought and received and paid for, only Mrs. Pappe's half of her original share; and no right which Bam's executor may have to the other half, can give him any title to claim any part of that which is the price paid by Mrs. Haworth for Mrs. Pappe's half.

The error has been in supposing that Mrs. Pappe had the power of alienating, and has alienated and effectually conveyed to Mrs. Haworth, that which was not the property of Mrs. Pappe, but belonged to Bam's executor; and therefore, that the latter must be entitled to claim from Mrs. Pappe, a part of the price received by her from Mrs. Haworth, proportionate to the value of that which is assumed to have been the property of Bam's executor, and which by her transaction with Mrs. Haworth she is assumed to have divested him of, and to have conveyed to Mrs. Haworth. Whereas the whole of the right and interest which Bam, or his executor, ever had (supposing them ever to have acquired any) in the property bequeathed by Peter Mestaer in trust for his brother's children, remains vested in Bam's executor, and that portion of said property, to which they acquired such right, is or ought to be held, at this moment, in trust for Bam's representatives, until Mrs. Haworth's death.

Bam's executor is entitled to prevent the trustees from disposing of any part of the property (if any) so held by them

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

to the prejudice of Bam's representatives, and the latter will be entitled, on Mrs. Haworth's death, to demand and receive this property (if any) from the trustees, or make them accountable for it.

On these grounds the judgment of the Court is for the plaintiff, as prayed, with costs. The defendant, the executor of Bam, to pay the costs both of the plaintiff and his co-defendants.

In coming to these conclusions, the Court have held, that whatever may have been the legal effect, in so far as relates to Mrs. Pappe, of the power of attorney executed by her brothers and sisters and her husband on the 10th August, 1836, to which his signature is affixed, yet that the execution of this deed did not alter or affect the nature of her interest in the property bequeathed by her uncle Peter, for the use of the children of his brother John, and which interest, previously to the month of August, had become vested in her, and that this case must now be decided precisely in the same way as if that deed had never existed.

Even if this deed should be held to be a legal and valid power of attorney, by which Mrs. Pappe, who is not in any part of it stated or described as having appeared before the notary, or as being in anywise a party to it, constituted Messrs. Home and Eagar to be her attorneys for any purpose whatever, which is a very doubtful question; and even if this deed should be considered as empowering her said attorneys to convey any interest which she had under her uncle Peter's will, which had not fallen under the communion of goods consequent on her marriage with Bam, and not merely such portion of such interest as at the time of the execution of this deed, had, in respect of such communion, been acquired by her said husband, a question which is anything but free from doubt—the Court hold that her intention to sell her interest, formed during the subsistence of the marriage, had not the effect of converting that interest, in so far as it related to real property, situated in England, and therefore not subject to the community of property, into personal property, and thereby rendering it subject to the communion.

The very first step in the sale to Mrs. Haworth, viz., the execution of the articles of agreement of April, 1837, had not been taken by Home and Eagar until some time after the decease of Bam.

After the manner in which this case has been argued, although the Court rest their judgment solely and entirely on the grounds already stated, it does not appear unfit for the Court to express an opinion on some of the points which have been discussed by the parties.

The Court are of opinion that the law of England must determine the period at which the interest which Mrs. Pappe

took under her uncle's will became vested in her; and that, by the law of England, it became so vested immediately on the death of her uncle Peter, or at least (which is the same thing in so far as relates to the decision of the present case) on her attaining majority.

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

That the nature of the trust estate which was created by Peter Mestaer's will in favour of the children of his brother John, must be determined by the law of England,—that the interest of Mrs. Pappe in a trust estate in real property situated in England, must be regulated by the law of England, according to which it did not fall under the communion of goods consequent on her marriage with Bam in this colony,—and therefore, that on her husband's death, neither his heir nor executor had any right or claim to any portion of her interest in such estate.

That the interest of Mrs. Pappe in a trust estate in personal property situated in England, must be regulated by the law of this colony, in which she and her husband Bam, had their domicile;—and that her interest in such estate did, by the law of this colony, fall under the communion of property between her and Bam, and on his death became divisible between her and his heirs and executors. That there is evidence furnished by the admission of the parties that, at the time of the death of Peter Mestaer, he was possessed of the house at Wanstead, and of that in Broad-street, mentioned in his will;—and that the trust estate created by the will, in so far as related to those houses, was a trust estate in real property;—consequently, that Mrs. Pappe's share or interest in that estate did not fall under, nor was in any way affected by, the communion of property arising from her marriage with Bam, and therefore, that if the funds now in dispute are to be considered as being the proceeds of, or derived from, or as representing the houses themselves, or as being liable to be disposed of in the same way in which the trustees would, by law, have been bound to dispose of the said houses, then, as Bam's executor would have no right or claim to any portion of the interest which Mrs. Pappe had in the two houses, he can have no right or claim to any portion of her share of the funds now in the hands of Home and Eagar.

The Court are of opinion that the following clause in the will,—“and it is my wish, that my executors do pay my legal debts as soon as possible and dispose of my property so as to fulfil the intention of my will,”—is not an absolute and peremptory order to his executors to sell his houses; and that a sale of those houses could not, consistently with the provisions of the will, be made during Mrs. Haworth's life, and was not necessary to enable the executors to fulfil the testator's intention, that, on her death, those houses should be divided,

Pappe
v.
Home, Eagar,
& Co.
and Bam's
Executor.

share and share alike, among his brother's children, who might have insisted on the executors' conveying those houses to them as tenants in common; and consequently, that this clause has not the effect of converting the trust estate, which, in virtue of the previous provisions of the will, was made an estate in real property, into a trust estate in personal property.

The Court have no evidence whatever, and not even a distinct allegation, that Peter Mestaer died possessed of any freehold or copyhold estates, other than the above-mentioned two houses, nor of any personalties which, by the provision of the will, the executors were directed to lodge in the government securities, to make up the £3000 per annum which Mrs. Haworth was to enjoy during her life; and even if Peter Mestaer had been proved to have died possessed of any such freehold and copyhold estates and personalties, it would have been impossible for the Court, in respect of such estates and personalties, to give effect to the arguments of either of the parties with reference to such estates and personalties, without having first decided certain questions of an intricate nature as to the true intent and meaning and legal effect of the provisions, with respect to those estates and personalties, which Peter Mestaer has made in his will.

It is a matter of some satisfaction to the Court that, in consequence of feeling it their duty to decide this case solely and exclusively on the grounds already stated, it is unnecessary to postpone its decision until evidence should have been obtained as to the existence of any such estates or personalties; and that they are wholly relieved from the necessity of giving any decision on any of the intricate questions which would then arise respecting the same.

13. DE SMIDT v. BURTON, MASTER OF THE SUPREME COURT.

[28th May, 1841.]

Where, in the terms of a Mutual Will, made by two persons married in Community, the survivor was entitled to the Usufruct of the Inheritance of a Minor Child, under the burden of maintaining and educating the Minor,—and the Mother, surviving, had for some years allowed the Interest of the Minor's Inheritance, except a small annual amount for his maintenance,—to accumulate in the hands of the Master of the Supreme Court, as Guardian of the Minor, who at the same time administered his property,—the Court

held that the Plaintiff, who had married the Widow in Community, and who had also for several years after his marriage with her allowed the Interest to accumulate as before, was entitled to bring an Action for the recovery of the Interest accumulated, both before and after his marriage, as being Property of the Community.

This was an action to recover a sum of £6690, being the balance of certain arrears of interest due upon the inheritance of Jan Willem van Rees Hoets, minor son of the late Marthinus Hoets, of Cape Town, which inheritance, it was averred, had been erroneously placed under the administration of the Orphan Chamber by the executors; and to which administration the defendant had succeeded, in his capacity as Master of the Supreme Court.

De Smidt
v.
Burton,
Master of the
Supreme
Court.

Mr. and Mrs. Hoets, in 1816, made their will, in the Dutch language, appointing each the other sole heir of all the property left by the first dying of them; upon condition, however, that the survivor should be bound to bring up, maintain, and support their child or children "in an honest, christian manner," until their majority, marriage, or other approved estate, when such an amount of ready money should be paid them as the survivor should deem in conscience to be sufficient. But in the event of the survivor intending to enter upon a second marriage, he or she should be bound to certify the father's or mother's share at the hands of irreproachable persons, without, however, being obliged to pay it over sooner than before-mentioned, it being the express desire of the testators that the survivor should remain in full possession of the estate, in order to support and educate the minor children the better for the *usufruct* of their inheritance. Mr. and Mrs. Hoets had subsequently, in 1825, added a codicil to their will, cancelling the appointment of each other as executors and guardians, and nominating their brother-in-law, Mr. F. Korsten, and their brother, Mr. R. C. Hoets, together with the survivor of them, as executors, administrators, and liquidators of their estate, "with respectful exclusion of the Board of Orphan Masters." They desired, also, that their whole estate might be sold and liquidated in the most advantageous manner, within one year and six weeks, and, when that should have been accomplished, they desired further, "that a full insight should be given thereof to the Board of Orphan Masters, to enable them to ascertain what amount should be due to their minor son; and further nominated and appointed the Board of Orphan Masters as his guardians." The testator having departed this life in July, 1825, the Orphan Chamber accordingly took upon them the guardianship of the minor, and the administration of his paternal inheritance, which, as appeared

De Smidt
v.
Burton,
Master of the
Supreme
Court.

from the liquidation account, submitted in November, 1826, by Mr. Korsten, amounted to Rds. 103,577, or thereabouts, in mortgage bonds. In April, 1827, Mr. de Smidt, the plaintiff in this action, married the widow of the late Mr. Hoets, in community of property; and in June, 1827, Mr. R. Hoets, as one of the executors of his late brother's will, ceded and transferred to the Orphan Board the mortgage bonds forming the inheritance of his nephew, but without any communication with the late widow, or the plaintiff, who, however, when they became acquainted with what had been done, acquiesced, under an impression that this proceeding on the part of Mr. R. Hoets was lawful and necessary. Under this impression, also, Mr. de Smidt applied to the Board to be allowed a certain sum annually, out of the interest, for the support and maintenance of the minor, and was allowed, from the 1st January, 1828, for those purposes, an annual sum of Rds. 800. In 1833, on the abolition of the Orphan Chamber, the estate was, by force of the Ordinance No. 103, placed under the guardianship of the defendant, in his capacity as Master of the Supreme Court, who has till now continued in charge of the same, together with the interest, deducting the amount paid for the minor's maintenance. Mr. de Smidt, however,—having been advised that, according to law, and the true intent and meaning of Mr. Hoet's will and codicil, the widow, and not the Orphan Board, had been entitled to hold possession of the whole estate, until the minor should attain his majority,—brought this action to recover the arrears of interest, less the sums paid for the maintenance of the minor; he agreeing to leave the bonds, &c., in the possession of the Master, on being regularly paid the interest accruing from them until the minor should become of age.

The defendant pleaded that, assuming the truth of all the matters of fact above stated, he denied the conclusions which the plaintiff had deduced from them; and further, that, considering the relation in which the said minor stood to the plaintiff and his wife, when they deliberately approved and affirmed the arrangement made by Mr. R. C. Hoets with the Orphan Board, and their admitted acquiescence in that arrangement during so long a series of years (the character of which arrangement they could have so readily ascertained through the medium of professional advice), the plaintiff now stands precluded and estopped from disputing its validity.

The Attorney-General and Brand appeared for the plaintiff and Cloete and Musgrave for the defendant.

The plaintiff put in the will, certain minutes of proceedings of the Orphan Board, and letters, showing the acquiescence of Mrs. Hoets and the plaintiff.

The defendant proposed to call a witness to prove that by

the words in the codicil, "and when that (*i.e.* the sale and liquidation of the estate) should have been accomplished, they desired further a full insight should be given thereof to the Board of Orphan Masters of the said town, in order thereby to enable them to ascertain what amount thereof should be due to their minor son,"—the testator intended to give the entire administration of his son's paternal inheritance to the Orphan Chamber.

De Smidt
v.
Burton,
Master of the
Supreme
Court.

The Court held that, as there was no ambiguity as to the meaning of the clause, parole evidence to prove what was the intention of the testator was inadmissible.

Raynier Christian Hoets was then called,—“I was one of the testamentary executors of my deceased brother Marthinus. There was a liquidation of the estate framed, dated 31st October, 1826. This account was framed by my co-executor, the late Mr. Korsten, and signed by him, the widow, and myself. There is a commission to the executors stated in that account, of which the widow received a third part. A second liquidation account was framed on the 29th February, 1828, and signed by the plaintiff (who, by this time had married the widow), as well as by Korsten and myself. The plaintiff received his share of the commission charged in that account. I executed the cession of the bonds to the Orphan Chamber, with the knowledge and consent of Mrs. de Smidt. I had, some months before the cession, deposited the bonds with the Orphan Chamber, for their inspection.”

The defendant put in the Instructions of the Orphan Chamber, 1714, 1793, and 1804.

The Attorney-General, for the plaintiff, maintained, that, under the will and codicil, the widow was entitled, until the majority or marriage of her minor son, to the administration of the amount of his paternal inheritance, and the *usufruct* of it, under the burden of maintaining and educating the minor; or, at all events, although the Orphan Chamber might have been entitled to take the minor's paternal inheritance under their administration, the widow was entitled to the *usufruct*. [Voet 5: 2, 65.] He also maintained that, in point of fact, what was done or acquiesced in by the widow or the plaintiff, was so done and acquiesced in, in ignorance of, and under an erroneous impression as to the nature and extent of their legal rights; and that there was no intention, on the part of the widow or the plaintiff, at any time, to make any donation of anything that was legally theirs to the minor; and that the Orphan Chamber never considered that any donation was intended, but proceeded on a mistake as to their legal rights as guardians of the minor. He maintained, that the plaintiff's claim was not barred by anything which had been done by them, or by any acquiescence made in consequence of a mistake

De Smidt
v.
Burton,
Master of the
Supreme
Court.

in point of law. [Evans' translation of Pothier, vol. 2, App. No. XVIII., p. 390; 2 East, 469; Huber, 3: 28, § 8; Stair, 1: 7, 9, and note F in Appendix; Van der Keessel, Thesis 796; Voet 12: 6, §§ 7-16; Voet 23: 2, §§ 2, 10 and 14; Voet 22: 6, § 5.]

Cloete, for the defendant, maintained, 1st, that it is clear from the words of the will and codicil, that the testator intended to give the entire administration of the paternal inheritance to the Orphan Chamber. 2dly. That the appointment of the Orphan Chamber as guardians of the minor, "with such power as shall belong to them according to law," and the provisions of the Instructions for the Orphan Chamber, had the effect, in law, of entitling them to the administration of the paternal inheritance. 3dly. That even if this was not the fact, still that both the widow before her marriage, and the plaintiff after it, did voluntarily resign and convey to the Orphan Chamber the administration of the paternal inheritance of the minor, and with it the right to the *usufruct*, except a reasonable allowance for maintenance. 4thly. That this resignation and conveyance of the administration was not made with an ignorance of law or fact. 5thly. That even if it had been made in *ignorantia juris*, the plaintiff, under the circumstances of this case, is not entitled to what he now claims. 6thly. That even if he should be entitled now to reclaim the administration of the paternal inheritance, and to the *usufruct* thereof, until the majority or marriage of the minor, still that he has no claims to the proceeds of the *usufruct* preceding the date of the judgment in, or at least the commencement of, this action.

In support of those propositions, he founded on the word "liquidation" of the estate, and on the direction to sell and liquidate the whole estate, as showing that the possession of the whole estate was taken from the widow, as such, and placed in the executors; and therefore, as there was no provision that the possession and administration of that part of it, which formed the paternal inheritance of the minor, should be conveyed by the executors to the widow, she had no title to claim it, and it necessarily devolved by law on the guardians of the minor, viz., the Orphan Chamber. He argued that this was the object of the codicil, which intended to cut away from the widow anything to which, under the will, she would have been entitled as guardian of the minor.

He maintained that the Orphan Chamber had, by law, greater power and privileges than ordinary guardians. [Grotius' Intro., b. 1, c. 9, § 3; Van der Linden, b. 1, c. 5, p. 101.] That, without an express exclusion of the Orphan Chamber, (and *a fortiori* when appointed guardians) they were entitled, even if a third person had been appointed guardian, to the



administration of the property of the minor; the guardian being entitled to the guardianship of the person of the minor. Instructions of Orphan Chamber of 1804, articles 33, 34, 36, and 38 ; also 3, 18, 48.]

De Smidt
" Burton,
Master of the
Supreme
Court.

In support of the 3d proposition, he founded on the expression of a letter by the widow, 21st February, 1827, "in so far thus *the wish of* the testator has been accomplished," and the conduct of the plaintiff in being a party to the second liquidation account, and to the payment by him and the other executors of the minor's share of the proceeds of that account to the Orphan Chamber.

The Court held that, in this case, there were two distinct and separate questions. 1st, whether the widow of the testator, or the Orphan Chamber, was entitled to the administration of this minor's paternal inheritance during his minority. 2ndly, whether the said widow, or her said son, was entitled, during his minority, to the interest and other annual profits arising from his paternal inheritance during his minority. On the latter question, the Court held that, by the will, the testator had, as he lawfully might do, given the *usufruct* of the interest, and other profits aforesaid, to his surviving widow, during his son's minority; and that he had done this by virtue of the clause in his will by which he had appointed his surviving widow sole and universal heiress of all his moveable and immoveable property, actions, credits, inheritances, and bequests, nothing in this world excepted, to be possessed by the survivor, as his or her free and unencumbered property, without any gainsay of any one; upon condition, however, that the survivor should be bound to bring up, maintain, and support such child or children as might be procreated within the marriage, in an honest, christian manner, until their majority, &c.; when to each of them, for or in lieu of their parental inheritance, or share, should be paid out such amount of ready money as the survivor should deem, in conscience, to be sufficient in respect of the amount of the estate: but in the event of the survivor intending to enter upon a second marriage, she should be bound to certify the father's share at the hands of two irreproachable persons. And not, in virtue of the provision in the will, "without, however, being obliged to pay over the amount of such paternal share sooner than before-mentioned, but the same should remain under the survivor;" which last provision was only intended to carry into effect the testator's desire, expressed in the will, "that the survivor should remain in full possession of the estate, in order the better to support and educate the minor children, for (*i.e.* in consideration of) the *usufruct* of their inheritance, until the time before-mentioned."

Neither was the right of the survivor to the *usufruct* of the child's share in any wise derived from, or dependent on, the

De Smidt
v.
Burton,
Master of the
Supreme
Court.

clause by which the survivor was appointed executor to the will and guardian to the minor children. That the codicil contained no revocation or alteration of the will, either as to the nomination of the survivor, as sole and universal keeper, nor as to the bequest of the *usufruct* of the child's inheritance during minority; and therefore, although it revoked the appointment of the survivor as sole executrix of the will, and appointed her co-executrix with two others, and also revoked her appointment as guardian of the children, and substituted the Orphan Chamber as guardian, and although it gave the Orphan Chamber a right to a full insight of the estate, after it was sold and liquidated by the executors, in order merely to enable them to ascertain what amount should be due to the children as the sum of the paternal inheritance, it had not the effect of depriving the survivor of the *usufruct* of the children's shares, which was, during the minority, given to the survivor by the will, nor in any way impairing her right to that *usufruct*, even if it should be held to have deprived the survivor of the administration of the capital of the children's shares during their minority, and vesting that administration in the Orphan Chamber. That the cession and delivery of the said capital to the Orphan Chamber, or anything else which had been done by the widow before her second marriage, or by her and the plaintiff afterwards, had merely the effect of vesting the Orphan Chamber with the administration, during the child's minority, of the said capital, and the interest and profits arising from it, for the use and benefit of those by law entitled to such capital, or to such interest and profits; and not of conveying to the minors the *usufruct* belonging to the survivor.

That the delay on the part of the widow and the plaintiff in drawing such interest and profits from the Orphan Chamber, did not bar them from enforcing their right to both for the time past, since the testator's death, and for the future, during the continuance of the minority.

The Court therefore gave judgment for the plaintiff, as prayed, for £6,690, being the admitted balance of arrears of interest, subject to deduction of the amount of such fees as the Orphan Chamber formerly, and the Master of the Supreme Court now, were entitled to claim in respect of these administrations; and adjudged the defendant to pay to the plaintiff, during the marriage, and until the testator's son should attain majority, the whole of the interest, &c., arising from the funds belonging to the said son under the defendant's administration, subject to a like deduction of the amount of fees and costs to be paid by the plaintiff. As the plaintiff consented to allow the capital belonging to the minor to continue under the administration of the Master, it was unnecessary to decide, and the Court gave no decision, as to whether, under the codicil, the

Orphan Chamber and not the surviving widow, was entitled to the administration of the paternal inheritance of the minor during his minority; or whether the widow, by having resigned and delivered over the administration to the Orphan Chamber, and the widow and plaintiff having so long acquiesced in the exercise of that administration by the Orphan Chamber and the Master, were or were not barred from now reclaiming that administration from the Master, even although, by the provision of the will and codicil, the surviving widow had been originally entitled to such administration.

De Smidt
v.
Burton,
Master of the
Supreme
Court.

14. LAING v. ZASTRON'S EXECUTRIX.

[29th June, 1846.]

Cession by a Husband, married out of Community, of a Bond, the separate Property of his Wife, by virtue of a general Power from her in his favour, held good.

This action was brought by the plaintiff to obtain delivery to him of a bond for £600, alleged to have been ceded and delivered to him for a valuable consideration by the late C. M. Zastron, whose widow and executrix the defendant was,—which was entrusted by the plaintiff to the keeping of the said Zastron, to be holden by him for the use of the plaintiff,—which on Zastron's death was found in his repositories, and which the defendant refused to deliver to the plaintiff.

Laing
v.
Zastron's
Executrix.

The defendant pleaded that her deceased husband was not duly authorized to cede the said bond, which was her separate property, and also that the cession made by Zastron was not followed up and completed by any delivery to the plaintiff.

The following statement of the admitted facts of the case was put in, signed by the attorneys of both the plaintiff and defendant:—

That on the 28th November, 1837, Peter Laing, being on the point of leaving the colony for England, executed a general power of attorney in favour of Messrs. Carel Mauritz Zastron, William Wright, and Johan Keulsen, as well jointly as severally.

That it was agreed upon between the agents, that Mr. Zastron should be the administering agent, and as such he has accordingly administered the affairs of P. Laing.

That on the 30th June, 1844, Mr. Zastron rendered an account-current of the affairs of Mr. Laing to Keulsen (Wright having in the meantime surrendered his estate), closing with a balance of £678 15s. 8½d. in favour of Laing, which account-current was approved of by Keulsen; and that on the same

Laing
v.
Zastron's
Executrix.

day Mr. Zastron, in pursuance of an agreement respecting the settlement of that balance, handed over to Keulsen the following certificate :—

"I hereby certify that a sum of £678 15s. 8½d. is due to Mr. Peter Laing, by an account-current, closed between me, as the administering agent, and Mr. Johan Keulsen, as the superintending agent of the said Peter Laing; and that the balance of account as aforesaid has been settled in the manner following, subject to the approval of the said Peter Laing, to wit :—

1st. By a mortgage bond, dated 1st June, 1838, originally passed by James Powrie, in favour of the late P. A. Polemann, and now ceded to P. Laing. In capital.....	£600	0	0
With interest from 15th May, 1844, to 30th June, 1844.....	4	10	0
2d. By a bond, dated 30th June, 1844, in favour of said P. Laing, due by C. M. Zastron. In capital.....	58	12	7½
3d. By a promissory noted, dated 30th June, 1844, in favour of P. Laing, due by Mr. Keulsen.....	15	13	1½
Making together, as above,.....	£678	15	8½

C. M. ZASTRON, q.q. P. LAING."

That at the time Mr. Zastron granted the above certificate, he was the general agent of his wife, Mrs. Pieter Heinrich Polemann, with whom he was married without community of property, and that in the capacity of such general agent, Mr. Zastron ceded the above bond of Powrie to Mr. P. Laing, and at the request of Mr. Keulsen, Mr. Zastron also bound himself as surety for the above bond.

The following is a copy of the cession :—

"I, the undersigned, in my capacity as the general agent of my wife, Aletta Johanna Sophia Schwynhage, widow of the late Pieter Heinrich Polemann, by virtue of a power of attorney, dated the 15th May, 1840, do hereby cede and transfer, in full and free property, to and on behalf of Mr. Peter Laing, his order, heirs, administrators, or assigns, certain mortgage bond (hereunto annexed), bearing date the 1st June, 1838, amounting in capital to six hundred pounds sterling, with interest thereon, reckoned from the 15th May, 1844, up to this day, at six per cent. per annum, value received as follows :—

In capital	£600	0	0
With interest thereon from 15th May, 1844, to the 30th June, 1844, at 6 per cent.	4	10	0

Cape Town, June 30, 1844. £604 10 0

C. M. ZASTRON, q.q.

I hereby bind myself, as surety *in solidum*, for the above sum of £600 sterling, with interest due thereon.

June 30, 1844. C. M. ZASTRON."

That the above bond was not taken away by Keulsen, but left by him in possession of Mr. Zastron, as such administering general agent of Peter Laing. That upon the death of Mr. Zastron, the above bond with the cession were found in the estate of Mr. Zastron among the papers of Laing, which were kept separate and distinct from Mr. Zastron's own private papers.

Laing
v.
Zastron's
Executrix.

That on the 15th August, 1845, Mr. Zastron, as the general agent of Peter Laing, received from Mr. Powrie one year's interest on the above bond, reckoned up to 15th May, 1845.

That in the ante-nuptial contract, executed between Mr. and Mrs. Zastron, she has not reserved to herself the administration of her separate property.

The following is a copy of the deed:—

"1st. That there shall be no community of property between the said intended consorts.

"2dly. That each of the said consorts shall be at liberty to dispose of his or her property and effects by will, codicil, or other testamentary disposition, as he or she may think fit. Upon which stipulations and conditions the said appearers declared it to be their intention to solemnize the said intended marriage, mutually promising to allow each other the full force and effect thereof, under security of their persons and property, according to law.

"Thus done," &c., &c.

Postea (13th July, 1846).—The Court gave judgment for the plaintiff, as prayed, with costs.

They held that Zastron had (without reference to his marital power of administration) full power, as the general agent of his wife, to cede the bond, and that delivery of the bond, sufficient to complete the cession, had been made.

15. SCOREY *v.* SCOREY'S EXECUTORS.

[13th June, 1848.]

A Wife is not barred from claiming her legal rights on the Dissolution of the Marriage in Community by the Death of the Husband, by any Act of Renunciation of such rights executed by her during the Marriage.

The declaration of the plaintiff set forth in substance as follows:—

That the plaintiff and the deceased, James Scorey, were married in community of property at Cape Town, on the 4th February, 1847. That the said J. Scorey had previously

Scorey
v.
Scorey's
Executors.

Scorey
v.
Scorey's
Executors.

made a certain will at London, in England, bearing date the 16th October, 1846; whereby he made certain dispositions touching and concerning his property, and appointed certain persons executors of the same. That the said J. Scorey, being then very weak in body, did, on the 19th June, 1847, at Cape Town, make a certain codicil to his said will, whereby, among other things, he bequeathed to the said plaintiff the rents, issues, and profits of all such property as he should have in this colony, and after her death to go to his and her daughter, Ann Elizabeth Scorey, and to such other child or children as should thereafter be born of his marriage with the plaintiff, in equal shares.

That the said J. Scorey thereafter, on the 20th June, 1847, made a second codicil to his said will, whereby, among other things, he declared that the bequest in the said codicil of the 19th June, 1847, made to the plaintiff and the said Maria Ann Elizabeth, or other child or children, was so made by way of legacy, and in addition to the bequest made to the plaintiff in his aforesaid will. That the said J. Scorey afterwards, on the said 20th June, 1847, made a third codicil to his said will, containing matter not necessary to be now set forth. That on the said 20th June, 1847, at the instance of the notary public, by whom the said second codicil had been drawn, the plaintiff was induced to sign, and did sign, a certain indorsement upon the said second codicil drawn up for her signature by the said notary, to the effect following, that is to say :—

“I, Maria Rebecca Scorey, wife of James Scorey, do hereby declare that I am fully aware that my said husband intended that the provisions made in my favour in the will and codicils executed by him upon the 16th October, 1846, and 19th and 20th June, 1847, respectively, should be in lieu of any claim which I may have to the joint estate, as having been married in this colony in community of property; and further declare, that I am perfectly satisfied with the provisions contained in the said will and codicils, and do hereby renounce any further claim against the said estate, on account of such community of property aforesaid.

Dated at Rondebosch, this 20th day of June, 1847.

M. R. SCOREY.

Witnesses :—HENRY REID.
JOHN BEVIL.”

That when the plaintiff so signed the said indorsement or renunciation, she was in much distress of mind, arising from the then approaching death of the said J. Scorey, and that the nature and effect of the provisions of the said will and codicils were neither explained to, nor understood by her, and

that she had neither the information nor the time, nor the mental self-possession, necessary to enable her to propose such an act as that of renouncing her rights under community of property, even were it competent for her, as a married woman during her husband's lifetime, by any such act or instrument as that in question, to renounce irrevocably those rights, which the plaintiff, as matter of law, submits that it would not have been competent for her to do.

Scorey
v.
Scorey's
Executors.

That the said J. Scorey died on the 21st June, 1847, leaving the plaintiff and the said Maria Ann Elizabeth, his daughter, him surviving, and that since his death another daughter has been born to him by the plaintiff, both which children are still surviving.

That the plaintiff being, shortly after the death of the said J. Scorey, made aware of the supposed effect of her said act of renunciation, she hath wholly abstained from in any manner ratifying or confirming the same, but on the contrary, has made her election to claim her rights as a surviving spouse, married in community of property.

That by reason, first, that her said supposed renunciation was made during the lifetime of her said husband, it must be taken to have been made under his influence, and is therefore void. And, secondly, that by reason of the other things hereinbefore in that regard alleged, she ought to be relieved against the said act of renunciation, as being executed through ignorance and mistake, even if a valid act of renunciation might, by law, have been made.

Wherefore the plaintiff prayed that the said act of renunciation may be declared null and void, and that the plaintiff may be declared to be entitled, notwithstanding the same, to her legal rights as a surviving spouse, married in community of property, and that the joint estate may be administered in conformity with such legal rights; or that the plaintiff may have such further or other relief as to this honourable Court may seem meet, with her costs of suit.

The defendants, in their plea, denied all the allegations of fact and conclusions of law in the said declaration contained, and joined issue thereon with the plaintiff.

The marriage of the plaintiff with the deceased J. Scorey, and his decease on the 21st June, 1847, were admitted.

The plaintiff put in copies of the will, the three codicils, and the act of renunciation referred to in the declaration, all of which were admitted. By the will, the testator disposed of all his property, after deduction of legacies, &c., to trustees on trust, to pay the interest, rents, issues, and profits of one moiety of the same to his late wife's daughter, Ann Falconer, the wife of William Falconer, during her life, and after her death to remain in trust for her child or children by the said W. Falconer

Scorey
v.
Scorey's
Executors.

who should attain the age of 21 years, to be divided, if more than one child, in equal shares between them, and if only one child, the whole to be in trust for him or her. And in case the said Ann Falconer should die without issue by her said husband, then in trust for six nieces therein named; "Provided always and I hereby declare, that the provision made by this my will, for my late wife's daughter, Ann Falconer, is intended to be, and to be accepted, in lieu and in full satisfaction and discharge of all claims and pretensions (if any) which, under the laws of the colony of the Cape of Good Hope, or otherwise, she may have against my estate, as the daughter of, and in right of, my late wife."

And as to the other moiety of the trust property, the trustees were to hold it in trust to pay the interests, rents, issues, and profits thereof, to his late wife's niece, Maria Rebecca Robinson, spinster (the plaintiff), during her lifetime, and after her death to remain in trust for her child or children who should attain the age of 21 years, to be divided, &c., &c., and in case she should die without leaving issue, then in trust for the testator's aforesaid six nieces, &c.

By the first and second codicils, the defendants were appointed executors thereof, and of the property thereby bequeathed, and the defendant, Joseph Simpson, was by the will appointed one of the executors thereof, and by the first codicil, one of the tutors of the testator's minor children.

It was admitted by both parties, that an amicable arrangement had been entered into between the plaintiff and Ann Falconer and her husband, in consequence of which they had no interest in the issue of this action.

A question was mooted, whether the six nieces ought not to have been made parties to this action, by being summoned as defendants.

The Attorney-General quoted Daniell's Chancery Practice, vol. 1, p. 317, and maintained that it was not necessary that they should, and so the Court found.

The Court also held, that the children of the testator and the plaintiff were sufficiently represented by the defendant, Joseph Simpson, one of the tutors: and that the defendants were the proper defendants in an action involving questions as to the property disposed of by the codicils.

It was agreed that the parties should, in the first place, argue the legal point,—whether a wife, married in community of property, can, under any circumstances, in her husband's lifetime, execute an irrevocable renunciation of any of her rights under the community of property, which can bar her from claiming those rights after the dissolution of the marriage by the death of the husband.

The Attorney-General, Brand, and Watermeyer, contended

that a wife could not do so; and maintained that her rights, by law, under the community of goods, must be at least as favoured and protected by law, and as inalienable, as those acquired by her under an ante-nuptial contract, and that as she could not renounce the latter, so as to bar herself from revoking the renunciation and claiming them (*vide* Voet 23: 4, § 62), neither could she make an irrevocable renunciation of the former, and quoted Voet 24: 1, § 13; Van Leeuwen, Cens. For., pt. I., l. 3, c. 11, § 7; Loenius Decis., Cas. 137, p. 792; Groenewegen de Leg. Abrog., Cod. 4: 29, l. 11; Neostadius, Observ. 4, § 3, de pactis ante-nuptialibus; Van Leeuwen, Cens. For., pt. I., l. 4, c. 12, § 5; Burge, vol. 1, p. 327; vol. 4, p. 633.

Scorey
v.
Scorey's
Executors.

Ebden, *contra*, maintained, that the effect of the renunciation in this case was not to benefit the testator, and therefore was not a donation by a wife to her husband, and that the transaction in this case was one by which the testator and the plaintiff intended to confer a benefit on their children, and was therefore a donation to the children, and not to the husband (*vide* Grotius' Introd., b. 3, c. 2, § 9; and Schorer's Notes).

That by the law of Holland, the plaintiff's deed of renunciation can be set aside only on the ground of its being a donation to her deceased husband, which it has been shown in fact not to be.

He also maintained, that what was transacted between the plaintiff and testator, even if considered without any reference to the interest of the children, was not *mera donatio*, but a *permutatio* between the spouses, which, by law, is both effectual and irrevocable; and quoted Dutch Consultations, vol. 4, con. 349, p. 638; vol. 2, p. 237; Pothier on the Pandects, l. 24, tit. 1, § 25; Burge, vol. 1, p. 327; Voet 24: 1, §§ 12, 13.

The Court, in respect of the authorities quoted by the plaintiff, especially those from Groenewegen, Neostadius, and Van Leeuwen, Cens. For., pt. I., l. 4, c. 12, § 5, held that the deed of renunciation was revocable by the plaintiff.

The Attorney-General and Brand were proceeding to argue that the plaintiff was entitled not only to revoke the renunciation and claim her legal rights under the community, but also, and at the same time, was entitled to the bequests made in her favour by the will and the codicils. But the Court held, that the summons and declaration contained no conclusion that the plaintiff should be found and declared to have such rights, and therefore, that the Court had in this action no jurisdiction to decide that question. And that, if in the course of the administration of the estate, this question should be raised, it must be tried and decided in another action.

Scorey
v.
Scorey's
Executors.

The judgment of the Court was, that the plaintiff is entitled, notwithstanding the act of renunciation executed by her on the 20th day of June, 1847, to her legal rights as surviving spouse, married in community with the deceased James Scorey, and that the joint estate of her and the said Scorey, under the administration of the defendants, be administered in conformity with such legal rights, with costs, payable out of the said joint estate.

CHAPTER IV.

SEPARATION "A MENSA ET THORO."

1. ADMINISTRATION BY ATTORNEY.
 2. VOLUNTARY SEPARATION.
 3. CUSTODY OF CHILD.
 4. PERSONAL VIOLENCE.
 5. SECURITY FOR THE WIFE'S HALF.
 6. PREVIOUS VOLUNTARY SEPARATION.
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1. TRUSTEE OF ZIEDEMAN *v.* DE WET.

[4th November, 1836.]

Where, on a Voluntary Separation, "a Mensâ Thoro et Communione," an Attorney of the Court was appointed by the Husband as his Agent in the administration of the Joint Estate, the Court held that such Attorney was entitled only to Commission as Agent, and not to Fees as an Attorney.

In this case, the declaration set forth that T. P. J. Ziedeman and his wife entered into an agreement before the notary J. P. de Wet, the defendant, whereby they agreed to separate *a mensâ thoro et communione bonorum*, and D. J. Kanne, meyer was appointed to administer and wind up the joint estate in conjunction with them, the said husband and wife.

Thereafter, by a procuration or power of attorney, dated 22d December, 1834, and passed before the notary C. M. de Wet, Ziedeman nominated and appointed the said defendant to act as his agent, on his special part and behalf, in the administration of the said joint estate of himself and his said wife, by virtue of which power the said defendant received and paid divers sums of money on account of the said Ziedeman, the balance whereof, in favour of the said Ziedeman, amounted to the sum of £49 12s. 11½d.

At the trial, the defendant admitted the balance claimed by the plaintiff, under deduction of Rds. 55 6 sk., with which

Trustee of
Ziedeman
v.
De Wet.

Trustee of
Ziedeman
v.
De Wet.

he maintained he was entitled to debit the plaintiff, as fees due to him for his services as an attorney of the Court;—but the Court held that the defendant, by accepting the procuratorship granted by Ziedeman, on the 22d December, 1834, acted as an agent, and not as an attorney of the Court, and therefore was only entitled to charge commission as an agent, and not both commission and fees as an attorney for that part of the business transacted by him under the power of attorney, dated 22d December, 1834, and gave judgment for the plaintiff for £49 12s. 11½d., and costs.

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2. ZIEDEMAN v. ZIEDEMAN.

[30th November, 1838.]

Judicial Separation decreed against the Husband by the Court, although four years previously a Voluntary Separation had taken place, by reason of the Ill-treatment, which at that time would have entitled the Wife to such Decree.—Any Agreement respecting Property in an Extra-Judicial Separation is utterly ineffectual against Creditors.—All Contracts between Spouses, “stante matrimonio,” not constituting directly or indirectly a Donation, are valid, as far as regards themselves.—A Voluntary Agreement of Separation, making provision for the division of the Community to which the innocent Spouse would, by Judicial Decree, have been entitled, if such Judicial Decree had been sought, is a legal, valid, and effectual Contract as between the Spouses themselves.

Ziedeman
v.
Ziedeman.

In this case, the Court (Kekewich, J., absent) held that such ill-treatment of a wife by her husband, in 1834, as would have been sufficient to entitle her to a judicial separation *a mensâ thoro et communione bonorum*, if applied for by her in 1834, was sufficient to entitle her to demand and obtain such a judicial separation in 1838; and this, notwithstanding that subsequently to this ill-treatment the spouses had, in 1834, extra-judicially entered into a notarial contract for a separation *a mensâ et thoro*, and for a division between them of the goods then in community, and had acted on and under that contract until the suit for the judicial separation was commenced;—and granted decree of separation *a mensâ et thoro*, reserving for farther decision the principle on which the division of the property should be made.

Postea (12th December, 1838).—The full Court were of opinion that all extra-judicial contracts entered into between

spouses for the separation of the goods in community, and the non-liability of each for the future debts which may be contracted by the other, are utterly ineffectual against creditors or other third parties not representing either of the spouses (*vide* Voet 24: 2, §§ 17, 19).

Ziedeman
v.
Ziedeman.

That all contracts which spouses may lawfully and effectually enter into with each other *before marriage*, may lawfully and effectually be entered into by them *stante matrimonio*, in so far as regards and concerns themselves, provided always that such contract be not of such a nature as to constitute, either directly or indirectly, a deed of donation from one spouse to the other (*vide* Voet 23: 2, § 63; 24: 1. § 8).

That no contract entered into between spouses, whereby the one grants or conveys a stipulation in favour of the other, and that other receives only that and no more, which the former was under a legal obligation to grant or convey to, or stipulate in favour of the latter, and which, by law, the latter could compel the former so to grant, convey, or stipulate, is or can be deemed in law to constitute a deed of donation between the spouses; and such contract is therefore valid and effectual in all questions between themselves.

That, by the law of this colony, whenever one spouse has been guilty of such misconduct to the other as in law to entitle the latter to claim and obtain a judicial decree of separation *a mensâ thoro et communione bonorum*, the injured spouse is entitled to have decreed to him or her, in absolute property, one-half of the goods then in communion, and to be freed from all liability for any debts which may be contracted by the other after the due publication of the decree of separation.

That by reason of the misconduct proved in this case to have been committed in 1834 by the defendant towards the plaintiff, she thereby acquired a legal right to a judicial decree of separation *a mensâ thoro et communione bonorum*, which right she could then, as she has now done, have enforced by law before the extra-judicial notarial contract was entered into between them.

Therefore, as the defendant by said contract granted or conveyed to, or stipulated in favour of, the plaintiff, nothing else or more than he was, at the time of the execution of such contract, under a legal obligation (which the plaintiff could then, by law, have compelled him to perform) so to grant, convey, or stipulate, this contract does not constitute a deed of donation by the defendant in favour of the plaintiff, but is a legal, valid, and effectual contract in a question between themselves, which that now before the Court strictly is.

Wherefore the Court found that the separation of the goods which were in community between the spouses must be made in terms of, and according to the tenor and effect of, the said

Ziedeman
v.
Ziedeman.

notarial contract; consequently that the plaintiff is entitled to keep, or now to obtain (if she has not previously done so) possession of one-half of the goods which were in communion at the time of the execution of the said contract; and gave judgment for the plaintiff accordingly.

The plaintiff quoted Burge's Colonial Law, vol. 1, p. 327; Grotius' Introd., b. 3, c. 21, § 11, and Voet *ut supra cit.*

The defendant quoted Van der Linden, p. 214; Artzenius Inst., b. 2, c. 4, p. 163; Groenewegen, Cod. 5, tit. 19; Cens. For., pt. I., l. 4, c. 12; Voet 24: 1, §§ 6, 10.

3. FARMER v. FARMER.

[1st November, 1839.]

Who entitled to the Custody of an Infant Child.

Farmer
v.
Farmer.

This was an application on the part of the husband that the wife should be ordered to deliver up to him the male child, born by her four months after the deed of voluntary separation had been executed by them, and now about two years and eleven months old, and produced affidavits to show that the husband had been refused permission to see the child, and to have it attended by a medical attendant of his own selection.

Musgrave, for the wife, opposed the motion, and quoted Van Leeuwen, Cens. For., pt. I., l. 1, c. 15, § 16; Voet 23: 2, § 14; and the decision of the Chancellor and of the House of Lords in the cause of Wellesley Pole, and produced several affidavits in support of his opposition, particularly one from the child's medical attendant, Mr. Gird, dated 30th October, 1839, proving that the child, from its birth, was very delicate and sickly, and required great care and constant attention, and very cautious treatment; that strong medicine would injure him; that the mother's care of him has been unremitting in every respect, and that he believes, were the child removed from under the care of his mother, with his peculiar delicate constitution, it would seriously injure him, and probably be the cause of his death.

He produced also affidavits to show that the father had, previously and subsequently to the separation, lived in adultery, and that he had treated with cruelty a young child of the woman with whom he lived in adultery.

Cloete, *contra*, quoted Dig. l. 6, l. 4 *in med.*, and l. 8; Grotius' Introd., b. 1, c. 5, § 18, and Voet 5: 1, § 14, *in fine*.

He admitted that the Court are upper guardians of all minors, but quoting Voet 25: 3, §§ 5, 6, maintained that so

long as the marriage was not dissolved by a divorce *a vinculo matrimonii* on account of adultery or malicious desertion, the right to the custody of the children by the father is absolute, and that the Court have no discretionary power of interfering or depriving him of that custody; and quoted McLelland v. McLelland, 1830, Dowling's Practice Cases, 1: p. 81; Rex v. Manneville, 5 East, 221; De Manneville v. De Manneville, 10 Vesey, 61.

Farmer
v.
Farmer.

The further hearing of the case was postponed to give the husband time to answer the affidavits put in on the other side.

Postea (15th August, 1840).—In consequence of the applicant consenting to withdraw this application, and another made on the same subject on the 13th April, 1840, and to pay the costs thereof, the Court ordered that each party do pay their own costs of this day.

On the 25th May, 1840, the respondent had obtained decree of divorce against the applicant, on the ground of adultery.

4. VAN DEN BERG v. VAN DEN BERG.

[28th May, 1840.]

Separation "a Mensâ et Thoro," in respect of Personal Violence.

In this case, the Court, at the instance of the wife, gave decree of separation *a mensâ et thoro et communione bonorum*, with costs, in respect of personal violence used by her husband to the plaintiff. (*Vide* Grotius' Introd., b. 1, c. 5, § 20; Van der Linden, b. 1, c. 3, § 9, p. 89; Voet 24: 2, § 16.)

Van den Berg
v.
Van den Berg.

5. RABIE v. RABIE.

[4th Feb. 1841.]

Attachment against the Property of the Husband, who was about to depart from the Colony, obtained by the Wife, who had commenced proceedings for a Separation "a Mensâ et Thoro," for the security of her half of the Common Property.

Rabie, the wife, had obtained the appointment of a *curator ad litem*, in order to enable her to bring an action against her husband for a separation *a mensâ et thoro et communione bonorum*, on account of ill-treatment.

Rabie
v.
Rabie.

Rabie
v.
Rabie.

This day (4th February), Cloete, for the wife, in an affidavit stating that the husband was disposing of all his property, and making preparation for immediate departure with the proceeds from the colony to Natal, moved for and obtained an order for an attachment of the property of the husband, in whose hands soever it may be found in the colony, until he should find security to the satisfaction of the *curator ad litem*, for at least £200, to meet the wife's claim to one-half of the goods in *communione*, to remain in force till the last day of the next sitting of the Circuit Court at Graaff-Reinet, unless the same shall sooner be discharged.

NOTE.—Decree of separation was afterwards given, and subsequently abandoned by the spouses, who resumed cohabitation. After which the wife, with the assistance of her paramour, murdered her husband, for which they were convicted and hanged.

6. BOOYSEN v. BOOYSEN.

[29th February, 1844.]

Judicial Separation "a Mensâ et Thoro," notwithstanding a previous Voluntary Separation.

Booyesen
v.
Booyesen.

This was an action brought by the wife against the defendant, her husband, for divorce, on the ground of adultery by him committed.

It was admitted that the parties had, on the 4th December, 1838, executed voluntarily a notarial deed of separation *a mensâ et thoro et communione bonorum*, and also another deed of the same date, regulating the manner in which the joint estate should be divided, and that it had been divided according to the conditions of the latter deed.

It was also admitted that the parties had not cohabited since the said 4th December, 1838.

Before proceeding to call witnesses to prove the adultery, the plaintiff restricted the conclusions of her action to a decree of separation *a mensâ et thoro et communione bonorum*.

Brand, for the defendant, consented to such decree being given. And it was mutually agreed that the property of the two spouses *shall continue and be held to be divided*, according to the division and distribution thereof which had been made between the parties, under and by virtue of the two deeds aforesaid, executed by them on the 4th December, 1838.

Decree of separation was given accordingly, each party to pay one-half of the whole of the costs jointly incurred.

N.B.—The principal object which it appeared the plaintiff had in view in bringing the action, was to protect herself and the share of the goods in community, which she had received on the voluntary separation, from being made liable for the future debts which might be contracted by the defendant against the creditors, in which it was considered that the voluntary separation and division of the goods in community would afford her no defence. (*Vide* Voet 24: 2, § 19; and so it was found in, *Ziedeman v. Ziedeman* p. 238, *supra*.)

Booyesen
v.
Booyesen.

CHAPTER V.
D I V O R C E .

SECTION I.—MALICIOUS DESERTION.
SECTION II.—ADULTERY.

SECTION I.
M A L I C I O U S D E S E R T I O N .

1. PROOF.—EDICTAL CITATION.
 2. WARRANT TO COMPEL RETURN.
 3. PRIOR DECREE OF SEPARATION.
 4. INTERLOCUTORY DECREE TO RETURN.
 5. ABSENCE BEYOND THE JURISDICTION.
 6. DAMAGES FOR HARBOURING WIFE.
 7. DECREE OF DIVORCE AGAINST WIFE.
 8. MOTION FOR ORDER TO RETURN.
 9. DIVORCE AFTER DECREE OF RESTITUTION.
 10. DITTO.
 11. DESERTION BEYOND THE JURISDICTION.
 12. PRIOR VOLUNTARY SEPARATION.
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1. REEVES v. REEVES.

[2d March, 1832.]

What constitutes Malicious Desertion.—Edictal Citation.

Reeves
v.
Reever.

This action was brought by the plaintiff against his wife, for a divorce *a vinculo matrimonii*, on the ground of adultery committed by her with one James Renovan, and also of malicious desertion, in respect that she had quitted the house and farm in Ireland, on which the plaintiff had settled her on his coming to this colony, in 1825, as her residence, until he should be able to bring her to this colony, and had privately and clandestinely embarked for North America

with the said James Renovan, notwithstanding the plaintiff had previously written to the defendant to rejoin him here, and had remitted funds sufficient to enable her to do so.

At the trial, the plaintiff put in the four edictal summonses which he had obtained against the defendant, respectively dated 25th June, 1829, 30th December, 1829, 30th June, 1830, and 31st December, 1830, and published in the *Government Gazettes* of this colony, dated 10th July, 1829, 8th January, 1830, 23d July, 1830, and 30th June, 1831, by which respectively she was summoned to appear before this Court on the 30th December, 1829, 30th June, 1830, 31st December, 1830, and 30th June, 1831. Also an affidavit sworn by Robert Armour, of Montreal, on the 4th May, 1830, before the Chief Justice of Lower Canada, and attested by the Governor and Colonial Secretary thereof, that he had, on the 16th April, 1830, served on the defendant, personally, a copy of the *Gazette* of the 10th July, 1829, containing the first edictal summons.

The order made by the Court on the 30th June 1831, granting the plaintiff the benefit of the 4th default, and the order of the Court, dated 30th September, 1831, allowing the trial to be postponed till the first trial day in this term, and the *Gazette* of the 7th October, 1831, in which that order was inserted, were also put in.

Cloete, for the plaintiff, stated that in consequence of certain persons in Ireland having refused to give evidence under the commission issued by this Court for that purpose on the 25th August, 1829, as appeared by the return made by one of the persons appointed commissioners, in his affidavit now produced, he was unable to prove the adultery at present, and restricted his claim to a divorce, on the ground of the defendant's malicious desertion; and called

John Ingram, who gave this evidence,—“I know the Rev. Mr. William Lewis, now holding the living of Killerly, in the County of Limerick. I know his handwriting and his signature. The certificate now shown me, dated the 17th October, 1831, is in his handwriting, and the signature affixed thereto is his.”

The certificate was put in—

“I certify that Robert Reeves and Jane Maunsell were married by licence, at the parish church of Killerly, on the 7th December, 1820, as appears by the registry of said parish.

“WILLIAM LEWIS, Rector of Killerly.

“Killerly Glebe, Limerick, 17th Oct., 1831.”

“I know the plaintiff and the defendant, whose maiden name was Jane Maunsell. I know they lived together as man and wife, in 1822 and 1823, in Limerick, but I was not present

Reeves
v.
Reeves.

at their marriage. The plaintiff had been a haberdasher, and left Ireland in consequence of having been unfortunate in business. He had become insolvent, and compounded with his creditors. I left this colony for Ireland in May, 1827. I had been desired by the plaintiff to inquire after his wife and to bring her out to him under my charge. In consequence, I went to Limerick in August, 1827, to the farm near that town, which the plaintiff had told me was his residence. I found that she was not there. I then made most minute inquiries about the defendant to her brother, Henry Maunsell, and two other of her brothers, and the result was that I learned she had left Ireland for Montreal, in company with a man servant, whose name I forget."

Richard Webber Eaton was next examined,—“I know the plaintiff. I resided in London in 1826 and 1827. I produce a letter from the plaintiff to me, dated 2d November, 1826, inclosing an invoice and a bill of lading for 2,290 lbs. of types, invoiced at £114 10s., consigned to me, which he requested me to sell for him; also a letter from him to me, dated 5th November, 1826, informing me that he was succeeding well in business, and containing this passage:—‘When we get easy we wish to increase our comforts, and the highest idea of comfort and happiness I form at present is to have the partner of my affections with me; particularly when I can do so with a degree of consistency which my former vicissitudes and peregrinations precluded. I therefore respectfully crave your kind assistance to effect so desirable an object, as I am fully convinced her present situation is uncomfortable. For this purpose I have consigned you the types, &c., &c., the net proceeds of which I shall feel particularly obliged by your appropriating as follows.’

[The letter then gives minute directions about obtaining a passage for Mrs. Reeves, and remitting her money for her expenses from Ireland to London, and until her embarkation; and mentions certain arrangements he had made for her passage in the event of the proceeds of the types not being sufficient to provide for her expenses and passage money.]

“I also produce another letter from the plaintiff to me, dated 6th November, 1826, to the same effect, and inclosing a draft on me for £25, by the plaintiff, in favour of his wife, to be sent by me to her, if I preferred that course to sending her a post bill for that amount. In consequence of these letters, which I received on the 15th January, 1827, I wrote to Mrs. Reeves, inclosing the plaintiff's draft on me unaccepted, and informing her I held £25 at her disposal. In answer to this, letter I received the letter, dated Limerick, 25th January, 1827, signed H. Maunsell, which I produce.”

This letter was put in and read:--

"Limerick, 25th January, 1827.

"Sir,—In answer to your letter to Mrs. Reeves, I beg leave to acquaint you, for the information of Mr. Reeves, that she is not in this country. As Mrs. Reeves left this quite against the wishes of her friends, any further application to Limerick would be quite useless.

"I remain, sir, yours, &c.,

"HY. MAUNSELL.

"To R. W. EATON, Esq.,

33, Lovegate, Little Eastcheap, London."

"The order was never presented to me for payment or acceptance. I made no farther inquiries after Mrs. Reeves, because I was satisfied she was not in Ireland. My letter to Mrs. Reeves was sent by post. I remained in England till 1829."

The plaintiff closed his case.

The Court held that the edictal summons had been proved to have been duly published. That the marriage between the parties had been duly proved. That it had been proved that the defendant had left Limerick, her former place of residence, between the 7th September, 1825, and August, 1827, and that she has not since joined her husband in this colony. That the plaintiff had not maliciously deserted his wife.

But before further answer the Court ordered that counsel be heard on the following questions of law:—

1st. Whether the facts proved amount to proof of malicious desertion by the defendant.

2ndly. Whether the defendant, more especially seeing that she has never been within the colony, has been brought under and become subject to the jurisdiction of this Court by reason of the edictal summonses.

This day (13th July, 1832), Cloete, for the plaintiff, argued the points upon which the Court, at the last hearing of the case, had directed an argument, and quoted Voet 5: 1, §§ 95, 101; 24: 2, § 13; Leyser. Medit. ad Pand., vol. 2, p. 58; Van Leeuwen Cens. For., pt. I., l. 1, c. 15, §§ 12 and 13; Loenius Decis. Cas. 16, p. 101–105; Zurk Cod. Bat. tit. Marriage, p. 562, § 30, and notes 4 and 5.

In support of the proposition that this Court has jurisdiction to dissolve this marriage, although it was contracted in Ireland, he maintained that the statute of 1 James I., c. 11, was an English statute and not applicable to Ireland.

But even taking this to be an English marriage (or, in other words, that the law of England and Ireland on this point is precisely the same), he maintained that this Court has jurisdiction to dissolve it, on the ground of desertion. Voet 5: 1, § 101.

Reeves
v.
Reeves.

Reeves
v.
Reeves.

He contended that the decision in Lolly's case was given solely on the statute of 1 James I., c. 11. That the Scotch Courts, notwithstanding the decision in Lolly's case, still exercise their jurisdiction of dissolving marriage on account of adultery, even although the marriage were contracted in England. (Cole v. Cole, 2d October, 1820, Consistory Court, Scotland, Moore's Report, Ferguson's Judgment, and Newberry v. Newberry, decided by the late Court of Justice here, by which an English marriage was dissolved by that Court, on the ground of adultery committed at sea, although the parties merely touched here as passengers in the course of their voyage to England.)

He maintained further that the affidavit of Rt. Armour proved that the defendant had personal notice of the proceedings, and as to the sufficiency of edictal citation, quoted Voet 24: 2, § 9.

The majority of the Court (Chief Justice, Burton, J., and Kekewich, J.,) being of opinion that there was not sufficient evidence to prove malicious desertion, and that the case should be dismissed on that ground, it became unnecessary for the Court to give judgment on any of the other points in the case.

The judgment of the Court was that the case be dismissed.

Menzies, J., was of opinion that the marriage was proved to have been celebrated according to the forms of the established church in Ireland, in 1820, between parties having their legal domicile in Ireland at that time.

That the parties continued to live together as husband and wife in Ireland, until some time in the year 1825, previous to the month of September in that year, when, in consequence of having been unfortunate in business, the plaintiff left Ireland and proceeded to this colony, leaving the defendant in Ireland.

That the plaintiff, when he so left his wife in Ireland, did so for the lawful and *bonâ fide* purpose of bettering the condition of himself and family, with knowledge and consent of the defendant, and the full understanding of both parties, that so soon as he had procured an establishment he should be re-joined by his wife. Consequently that, in thus leaving his wife in Ireland, the plaintiff did not wilfully and maliciously desert his wife.

That in the years 1826 and 1827 the plaintiff, by remitting money to Mr. Eaton, and employing him and Mr. Ingrau to procure a passage for his wife, not only did everything in his power to enable, but did what was sufficient to have enabled, his wife to rejoin him in this colony, if she had remained where he left her, and had been inclined so to do, and therefore that the plaintiff from 1825 up to the present time has not wilfully and maliciously deserted his wife.

That some time in the year 1825 or 1826, the defendant,

without the knowledge or consent of the plaintiff, abandoned the residence in the neighbourhood of her own relations, in which, on his departure from Ireland, he had left her, and has not from that time until now rejoined the plaintiff, but has totally, and without the consent of the plaintiff, absented herself from, and wilfully and maliciously deserted, the society of the plaintiff.

N.B.—If it had been necessary for the Court in this case to decide as to the legal effect of edictal citation of a wife by her husband, under the circumstances of this case, Menzies, J., would have given judgment for the plaintiff on the following ground :—

That the plaintiff, previously to the institution of the present suit, had acquired, and still continues to have his permanent domicile in this colony, the Supreme Court of which is now, *ratione domicilii*, his *forum* to all intents and purposes. Voet 5 : 1, §§ 92, 94, 97, 98.

That the *forum domicilii* of the husband is, by the law of this colony, deemed the *forum domicilii* of the wife, whether she be at the time actually resident within the territory of the said *forum* or not, and this for the trial of all questions, not only arising between the wife and third parties, but between the wife and the husband, and respecting the rights and obligations and duties of both parties, which result from their relation as husband and wife. Voet 5 : 1, §§ 95, 101 ; Cod. 10 : 39, l. 9 ; Voet 23 : 2, § 40.

That the circumstance of the defendant never having been actually in person within the territory of this colony, does not create any bar to, or defence against, the application of the last-mentioned rule of law in her case.

That, from the nature of the case, the last-mentioned rule of law, if it exists in any case, must apply in particular to actions for divorce by the husband against the wife, on the ground of the wilful desertion of the wife.

That, by the law of this colony, prior to the promulgation of the Charter, the late Court of Civil and Criminal Justice not only possessed, but constantly exercised, power and authority, by means of edictal citation, published in a certain form, to summon, as a party to any cause arising before the Court, any person, at the time personally absent from the colony, or the place of whose residence was at the time unknown, and whether such person had or had not at the time a legal domicile in the colony, who by reason of any interest or concern in the event or subject matter of such cause, if he had been personally present in the colony, ought, by law, to have been previously summoned as a party thereto,—the effect of such edictal summons being to authorise and make it the duty of such Court, on the failure of the person so edictally cited as

Reeves
v.
Reeves.

a party to such cause, to hear, proceed in, and determine such cause, in like manner, as if such person had, after being personally summoned within the colony, failed to appear as a party thereto. Voet 5 : 1, § 142.

That the Charter, so far from taking away such power and authority from the Supreme Court, does, by the provisions of the 32d and 33d sections, vest the like power and authority in the Supreme Court. And accordingly, such power and authority has, in practice, been constantly exercised by the Supreme Court, from its institution down to the present day.

That in this case it had been proved that the edictal citations of the defendant have been duly published, and consequently that the defendant has been duly summoned by the edictal citation to appear as a party in this cause.

That summons by edictal citation being good, although no proof is made of its having actually come to the knowledge of the person summoned, it is unnecessary to inquire into the legal effect to be given to the affidavit sworn by R. Armour, although that affidavit leaves little room for doubting that the defendant must be aware that the present action had been commenced against her.

That the Court is now authorised and bound, at the instance of the plaintiff, to hear, proceed in, and determine this cause, according to law, in like manner as if the defendant, after having been in this colony personally summoned as a party thereto, had failed to appear. Voet 24 : 2, §§ 13, 9, *et auct. inibi. cit.* ; Van Leeuwen Com. on Roman Dutch Law, pp. 85, 86.

2. DE WET v. DE VILLIERS.

[11th December, 1832.]

Refusal of a Warrant to compel a Wife to return to her Husband.

De Wet
v.
De Villiers.

The Court refused an application for a warrant to take the plaintiff's wife from the place, in which she was now harboured with her own consent, and to replace her in her husband's house, reserving to the plaintiff to proceed according to law.

3. ALCOCK v. ALCOCK.

[5th December, 1833.]

A Decree of Separation "a Mensâ et Thoro" subsisting, the non-adherence of the Wife cannot be founded on as an Act of Wilful Desertion.

This was an action brought by the plaintiff for a divorce *a vinculo matrimonii* against his wife, on the ground of malicious desertion.

Alcock
v.
Alcock.

The declaration, after setting forth the marriage of the parties, stated that, on the 7th October, 1822, they were, by a decree of the Circuit Court at Uitenhage, duly separated from bed, board, and community of property.

The Attorney-General, for the plaintiff, opened his case, and was proceeding to call evidence, but was stopped by the Court, who held that so long as the decree of separation *a mensâ et thoro* subsisted, the non-adherence of the wife could not be founded on as an act of malicious desertion, and therefore gave judgment for the defendant, with costs.

4. MULDER v. MULDER.

[1st February, 1836.]

An Interlocutory Judgment, decreeing the Wife to return to her Husband, pending certain proceedings regarding Property between them, refused by the Court.

In this case, the parties some time after their marriage, had had serious and violent disputes, chiefly respecting the disposal of certain money and property, which the wife had, in an ante-nuptial contract, reserved to her own use out of the *communio bonorum*. In consequence of those disputes, and of alleged ill-treatment of her by her husband, Mrs. Mulder left her husband's house, to which she refused to return, and made an application for an interdict to restrain him from disposing of certain property which she alleged was part of that reserved in the ante-nuptial contract.

Mulder
v.
Mulder.

While the proceedings respecting this interdict were still in dependence, this day, Brand, for the husband, moved the Court for an interlocutory judgment, decreeing the wife to return to her husband, and quoted Brouwer de Jure connubiorum, l. 2, c. 29, § 5.

But the Court did not see cause to grant the application, which was accordingly refused.

Thereafter, the husband brought an action against his wife for a divorce, on the ground of wilful and malicious desertion; but after hearing the evidence, the Court absolved her from the instance.

5. CAMPBELL v. CAMPBELL.

[19th August, 1836.]

What constitutes sufficient proof of Malicious Desertion, where the Wife had left the Colony and proceeded to England.

Campbell
v.
Campbell.

The declaration set forth the marriage of the plaintiff and the defendant, at London, in August, 1824, and that they had lived and cohabited together as man and wife from that time until in or about the month of December, 1832, or January, 1833, when being at that time within this colony, the said defendant, without any legal or reasonable cause, left the house of the said plaintiff, and maliciously deserted from him, the said plaintiff, and did, in or about the month of October, 1835, depart from and leave this colony, and hath, notwithstanding all endeavours on the part of the said plaintiff, declined and refused to return to the said plaintiff, with him to live and cohabit as man and wife. That, notwithstanding she, the said defendant, had been summoned by edictal citation to return to the said plaintiff, her lawful husband, she doth still keep away from him, and thereby refuse to return to him as aforesaid. Wherefore the said plaintiff prays that the said defendant may be declared a wilful and malicious desertrix, and that the bonds of marriage heretofore subsisting between them, the said plaintiff and defendant, may be dissolved by judgment of this Court, on the grounds and by reason of the malicious desertion as aforesaid.

A plea was filed as by and on behalf of the defendant, admitting the marriage, but *quoad ultra* pleading the general issue.

The plaintiff called and examined two witnesses to prove his declaration, when the Court having discovered reasons to doubt if the appearance for the defendant had regularly, and with sufficient warrant from the defendant, been entered by the attorney, stayed all further proceedings in the case, until the said entry of appearance shall have been proved to have been made by the defendant's authority.

The power of attorney, in virtue of which the attorney had entered the appearance, was dated 11th October, 1835, anterior to the commencement of the proceedings in the cause, and authorised him "to resist, withstand, and defend proceedings for a divorce, instituted against me by my husband."

Edictal process had been obtained by the plaintiff for summoning the defendant, but only the first summons had been taken out and published, and there was no proof of its having been served on the defendant.

The Attorney-General was absent, and there was every reason to believe that appearance had been entered without

there having been any instructions from the defendant to dispense with the regular service of the summons on her, or, indeed, that he had had any communication whatever with her since she left the colony, at or about the time when the power of attorney was dated.

Campbell
v.
Campbell.

Postea (25th August, 1837).—Appearance having been entered and the plea filed for the defendant, by attorney Borchers, who produced as his warrant of attorney a letter, which was proved to have been written and signed by the defendant in England, and to have been sent from thence by her through T. Phillips, J.P., for Albany, to Mr. Borchers, in which she acknowledged having seen the edictal citation against her in the *Government Gazette* of the 11th December, 1835, urged her said attorney to undertake her defence, and *empowered and requested him to present her respectful reply to the summons* to the Supreme Court of Cape Town, and declared her determination of never cohabiting with the plaintiff.

This day, Brand, for the plaintiff, called witnesses who proved all the facts alleged in his declaration, and in support of his claim for divorce quoted Placaat, 18th March, 1656; Placaat Book, vol. 2, p. 2445, art. 91.

Cloete, who appeared for the defendant, called no evidence.

The Court gave decree of divorce *a vinculo matrimonii*, as prayed.

6. LE ROEX v. VAN WYK.

[2d May, 1839.]

Damages for harbouring a Wife who had deserted her Husband.

The declaration in this case alleged that on the 16th of April, 1838, the plaintiff's wife did, unlawfully, and without any legal or reasonable cause, leave the plaintiff's house and maliciously desert therefrom, and that the defendant, well knowing the premises then and thereafter up to the 1st December, 1838, or thereabouts, unlawfully, wrongfully, and unjustly, and against the will of the plaintiff, and notwithstanding two successive interdicts granted by the Circuit Court, holden at Worcester, on the 14th July, 1838, and at Tulbagh, on the 18th October, 1838, whereby the defendant was interdicted to harbour the plaintiff's said wife, did

Le Roex
v.
Van Wyk.

Le Roex
v.
Van Wyk.

harbour, detain, and keep from him, the said plaintiff, his said wife, whereby, &c., &c.; and in respect of the premises claimed £500 as damages.

The defendant pleaded the general issue.

The facts of the case were as follows:—

The plaintiff's wife was the daughter of poor parents, and had been adopted and brought up by the defendant's wife before her marriage with the defendant. After this marriage, plaintiff's wife continued to live with the defendant and his wife, who had no family. Thereafter, the plaintiff, who was proved to be a simple, good-tempered man, married his wife, being greatly encouraged and induced thereto by the defendant, by whose invitation the plaintiff and his wife, after this marriage, resided in the defendant's house. The plaintiff's wife, a few months after this marriage, was delivered of a son, of whom it was proved the plaintiff could not have been the father. Although then aware of his wife's previous unchastity, the plaintiff agreed to pardon it and not to disclaim the child, which, notwithstanding and contrary to the plaintiff's express desire, his wife insisted should be christened by the christian names of the defendant. The plaintiff became disgusted at the conduct of his wife and the defendant, and left the defendant's house and required his wife to accompany him, which she refused to do, and persisted in her refusal, notwithstanding the interference of the elder of the church and the local civil authorities, and was encouraged in doing so by the defendant, at the same time professing her readiness to live with him if he would continue to reside with her in the defendant's house. The plaintiff then brought an action against his wife in the Circuit Court of Worcester, for restitution of conjugal rights, and obtained judgment, condemning her to return to the plaintiff and cohabit with him on or before the 1st September, 1838, and also an interdict against the defendant, prohibiting him from harbouring the plaintiff's wife, until the 14th of August next. The plaintiff's wife did not return to her husband, and he instituted an action against her, in consequence, before the Circuit Court, held at Tulbagh, on the 18th October, 1838, proceedings which were inept, but then obtained an interdict against the defendant, prohibiting him from harbouring the plaintiff's wife, to continue until the 1st day of next term, and thereafter, until removed by the judgment of some competent Court; which interdict was duly served on the defendant. The plaintiff's wife resided apart from the defendant, and as appeared, with her own mother, until the 20th November, when she came to a place not far from the defendant's, who sent his wagon for her and brought her to his house, where she continued to reside until the commencement of this action,—the interdict continuing in force.

Under these circumstances, the Court gave judgment for the plaintiff, £60 damages, and costs.

Le Roex
v.
Van Wyk.

In the course of the trial the plaintiff's counsel was proceeding to prove something which happened between the 17th and 27th days of December, 1838, when Cloete, for the defendant, objected to any evidence being received as to anything which had happened after the 1st December, in respect of the period of time specified in the summons.

Brand, *contra*, stated that in the declaration the ground of action was alleged to have occurred before the 1st day of December, or *thereabout*, which gave him a latitude as to time. That the issue was joined on the declaration, and not on the summons, and that the defendant, not having excepted to the variance between the declaration and the summons, could not now object to it.

The Court, in respect of this answer, allowed evidence to be led as to anything which had occurred in the course of the month of December.

7. LE ROEX v. LE ROEX.

[2d May, 1839.]

Decree of Divorce "a Vinculo" on the facts in the preceding Case.

This day the plaintiff, in respect of the judgment of the Circuit Court of the 14th July, and of the same facts which had been proved in the preceding case, obtained the judgment of the Court, declaring the marriage between him and the defendant to have been dissolved by reason of the malicious desertion, committed by the defendant, and *quoad ultra* gave judgment for the plaintiff, as prayed, with costs.

Le Roex
v.
Le Roex.

8. VAN BLERK v. VAN BLERK.

[30th May, 1840.]

Decree of Restitution not competent on Motion.

Ebden, for the husband, this day, moved the Court to make absolute a rule, granted to him by the Circuit Court of Graaff-Reinet, calling on the wife to show cause before this Court why she should not return and live with her husband.

Van Blerk
v.
Van Blerk.

The Court.
The Court.

The Court, without calling on the wife to show cause for charging the fact, with issue, finding that it was her complaint for the Court to make the issue against her husband, and that the only competent source of proof was for the husband to institute an action against his wife for restoration of conjugal rights.

9. MACKAY v. MACKAY.

[18th August, 1839.]

Issue against the Wife of Defendant "a Falsum Matrimonium" after a Decree of Exclusion of Conjugal Rights to which Judgment had been refused.

Mackay
v.
Mackay.

The plaintiff brought an action against the defendant, alleging that she had unlawfully and maliciously, and without just cause, deserted him, and refused to cohabit with him, since 10th February, 1838, and prayed that she might be decreed to return to and cohabit with him.

On the 14th May last, the plaintiff, in respect of the evidence of two witnesses of the marriage, and one of whom the uncle of the defendant, proved the following letter to be the handwriting of the defendant:—

"Cape Town, 27th December, 1839.

"Sir,—In reply to yours of the 26th November last, containing the following words,—'That having already on two several occasions on which I recently called on you, in Cape Town, endeavoured unsuccessfully, I regret to say, to impress you with the necessity of your returning to your duty and to me,'—I have to inform you, once for all, that from circumstances best known to myself, it is my resolve never to return to you again.

"M. MACKAY."

obtained decree, as prayed, adjudging the defendant to return to and cohabit with the plaintiff, within fourteen days.

The plaintiff now brought an action against the defendant for a dissolution of the marriage, on the ground of wilful and malicious desertion. He called two witnesses, one of whom proved the service of a copy of the decree of the Court, of the 14th May, on the defendant, on the 16th May, and that she had then stated her resolution of going to Stellenbosch (where the plaintiff did not reside).

The other proved that since May the defendant had been constantly living at her father's, in Stellenbosch.

The Court thereupon gave judgment for the dissolution of the bonds of marriage, as prayed.

10. VAN BLERK *v.* NAUDE.

[30th November, 1842.]

Where a Decree for the Restitution of Conjugal Rights had been obtained, and thereafter a Dissolution of the Marriage on the ground of Malicious Desertion was prayed, copy of the previous Judgment was considered sufficient proof of the Marriage.

A judgment of this Court had been obtained, in August last, by the plaintiff against the defendant, his wife, in an action for the restitution of conjugal rights, when she was ordered to return to him within one month after she received notice of that judgment.

Van Blerk
v.
Naudé.

Ebden, for the plaintiff, now prayed for a dissolution of the bonds of marriage, on the ground of malicious desertion, and put in affidavits to show that he had given all the notices necessary and sufficient to have this case tried by default, and that a copy of the former judgment had been served on the defendant on the 16th August. As proof of the marriage of the parties, he put in a copy of that judgment.

The Chief Justice expressed some doubt as to whether the previous judgment was evidence *per se* of the fact of the parties being married. After some discussion, however, it was admitted as such.

By the evidence of the Clerk of the Peace of the Paarl, and Mr. P. D. Höhne, it was proved that on several occasions, after having received notice of the former judgment of the Court, the defendant had declared that she would not go back to the plaintiff. She was living with her father, and had been away from her husband seven years.

Decree of divorce *a vinculo matrimonii* was granted, as prayed, on the ground of malicious desertion.

11. GOUGH *v.* GOUGH.

[2d December, 1845.]

To obtain a Decree of Restitution of Conjugal Rights in order to entitle the Plaintiff to a Divorce on the ground of Malicious Desertion, the Evidence must be clear that the Desertion has been wilful.

The plaintiff's declaration and intendit stated that the defendant had been duly summoned by edict to appear in this Court on the 15th November, 1845, to purge her third default,

Gough
v.
Gough.

Gough
v.
Gough.

she having been previously summoned to purge her first and second defaults, and to show cause why the bonds of marriage now subsisting between the plaintiff and the defendant, should not be dissolved by reason of the wilful and malicious desertion by the defendant, of her husband, the plaintiff. That the plaintiff and the defendant had been lawfully married in this colony, on the 6th February, 1832, and cohabited as man and wife until the 18th of May, 1839, when the defendant wilfully and maliciously deserted the plaintiff, and proceeded in a ship called the *Patriot*, to England, and has ever since remained absent from, and has never written or communicated to, the plaintiff, although he hath frequently addressed letters to the defendant, directed to her at Edgeware, where he believed, and still believes, her to have gone; but whether she received any of the said letters, or whether she is still living, or has departed this life, the plaintiff does not know, and has been unable to ascertain, no tidings or information whatever respecting her having ever, directly or indirectly, reached the plaintiff since her departure for England.

Wherefore the plaintiff prayed that the bonds of the marriage aforesaid between the plaintiff and the defendant may be declared to be dissolved for and by reason of the malicious desertion aforesaid, and the plaintiff to be at liberty to contract another marriage; or, in case the Court should consider that he is not entitled to such relief, then the plaintiff prays that as, for and during the space of five years and upwards, no tidings or intelligence concerning the defendant have been obtained by the plaintiff, and he is consequently uncertain whether the defendant is yet living or is now dead, he may be decreed to be at liberty to contract another marriage, leaving to the defendant such right, if any, as may to her belong in case she should ever again return to this colony to the plaintiff; or, that the plaintiff may have such other relief as to this honourable Court shall seem meet.

No appearance was made for the defendant at the trial.

The Attorney-General, for the plaintiff, stated that the plaintiff restricted his claim under this action to a decree for restitution of conjugal rights.

He then proved the due service of the edictal process, and called five witnesses, who proved the marriage of the plaintiff and the defendant, their subsequent cohabitation as man and wife, and that they had a child within a year and a half after their marriage, which died, and another child in 1837, which the defendant took with her to England.

Two of those witnesses also stated that before her departure they had heard her repeatedly talk of going to England, but did not think her sincere; that they thought she was dissatisfied with this colony, but not with her husband or station in

life. That the defendant said that she wished to go to England to see her mother, who lived near the Commercial-road, in London. That she did not say she would permanently remain there, nor anything about the length of her stay there.

Gough
v.
Gough.

The plaintiff stated that he had no further evidence.

The Court, in consequence of the absence of all evidence as to whether the defendant had gone to England with or against the consent of the plaintiff, or as to the nature of the inquiries, if any, which he had caused to be made concerning her in England, or of the causes or motives which prevented her or rendered her unwilling to rejoin her husband,—were of opinion that the plaintiff had failed to make out a case which entitled him to a decree for restitution of conjugal rights. That if he could find his wife he must be able to produce evidence which could clear up these circumstances, and he ought to produce it; and if he could not find his wife, or discover what had become of her, such a decree would be of no avail to him, as it could not be used as the foundation for an action of divorce, unless proved to have been communicated to the defendant personally. But, at the plaintiff's request, the Court postponed the further hearing of the case to give him an opportunity of producing further evidence.

12. BOTHA v. BOTHA.

[14th June, 1848.]

A Husband is not entitled to bring an Action for a Decree against his Wife to return to and cohabit with him, until a Voluntary Extra-Judicial Contract of Separation between them has first been annulled by a competent Court.

This action was brought in the Circuit Court of Worcester.

Botha
v.
Botha.

The plaintiff, in his declaration, alleged that, in the year 1838, the defendant, his lawful wife, wilfully and without just cause deserted his residence and family; wherefore he prayed that the defendant might be decreed to return to him, and to live and cohabit with him as her lawful husband. Appearance had been entered for the defendant by an agent, who had received a copy of the declaration, but no plea had been filed, nor was any appearance made for her in the Circuit Court on the day of the trial (22d May, 1848).

The plaintiff called the

Rev. Henry Sutherland, minister of the Dutch Reformed Church at Worcester,—who stated that he had known the parties for many years; that they had had a son, but had not

Botha
v.
Botha.

lived happily together; and that for nine or ten years past, the defendant had lived apart from her husband; that on three several occasions, with intervals of about a year between them, and the last of them about three months ago, he had, by desire of the plaintiff, spoken to the defendant, and endeavoured to persuade, but could not prevail on, her to return to and live with her husband, which she constantly refused to do.

The plaintiff put in a notarial insinuation which had been served on the defendant at his instance, on the 29th April, 1848, requiring her to return to his habitation and to live and cohabit with him, and intimating to her that, in the event of her refusing so to do, legal proceedings would forthwith be commenced at his instance against her, to annul and reduce the deed of separation executed between him and her, and entered into by him through the threatenings, persuasions, and entreaties of her friends; and also to obtain a dissolution of the marriage between him and her; to which insinuation the defendant had given the following answer:—

“I have positively determined, for reasons in the deed of separation, passed on the 14th November, 1838, before the notary, Mr. Philippus Johannes Poggenpoel, and witnesses, made known, and the weak state of my body, in which I have some years passed, and until this moment laboured under, never to reconcile or again live in a state of matrimony with Philippus Rudolph Botha, from whom I have separated myself by the above-mentioned act or deed. I have therefore no objection that the bonds of holy matrimony, existing between us, by judgment of the Court, be dissolved for ever, by which the deed of separation be cancelled and annulled. But I will never renounce from the amount of £1000 assigned to me by said deed, and object against the payment of any costs to be incurred in this case, as well by him who instituted this action, as by myself who will be forced to defend the same.”

Whereupon the Circuit Court removed the cause to the Supreme Court.

This day (14th June, 1848) Ebdon appeared for the plaintiff. No appearance was made for the defendant.

Ebdon referred to Van der Linden's Inst., b. 1, c. 4, § 9; p. 89; Brouwer de Jure Connub., p. 710; Voet 24: 2, § 19 and Grotius' Introd., b. 1, c. 5, § 20, note 30; and maintained that the plaintiff was entitled to bring this action and to obtain judgment therein, as prayed, notwithstanding the existence of the deed of separation mentioned in the insinuation, which being a private and extra-judicial separation, he maintained could be revoked and set aside by the mere will of either party, and without the necessity of any formal revocation or judicial proceedings to have it annulled; and stated that so

the Court had found in the case of *Van Blerk v. Naude*, p. 257, *supra*; in which the Court had—in consequence of its being proved that the defendant had refused to return to and cohabit with her husband—decreed that the defendant should return to and cohabit with her husband within one calendar month after notice of the judgment should have been served on her, notwithstanding that it was proved by the evidence adduced by the plaintiff that a voluntary and extra-judicial deed of separation had been executed by the parties; and that the plaintiff having afterwards brought an action against the defendant for a divorce *a vinculo matrimonii*, on the ground of malicious desertion, the Court had, in respect of its being proved by the plaintiff's witnesses that the judgment of the Court of the 9th August, 1842, had been duly served on her, and that she had, notwithstanding, refused obedience to it, and continued wilfully to desert her husband,—given decree of divorce, as prayed, on the 30th November, 1842.

Botha
v.
Botha.

The Court, on referring to the note-books of the Judges, found that in the case of *Van Blerk v. Naude*, the attention of the Court had not been specially directed to the existence of the deed of separation, and that the question as to the legal effect of that deed as a bar to the first action brought by *Van Blerk* had neither been raised by the Bar nor occurred to the Bench. They therefore held, that the judgment of the 9th August, 1842, had been given under such circumstances as did not entitle it to be considered as a precedent by which the Court should now be bound, and therefore now gave judgment, absolving the defendant from the instance, on the ground that the claim made by the plaintiff in this action could not legally be made, until the plaintiff had first succeeded in having the deed of separation annulled and set aside by the judgment of a competent Court, in an action brought by him for that purpose. (*Vide Alcock v. Alcock*, p. 251, *supra*.)

CHAPTER V.
D I V O R C E.

SECTION II.
A D U L T E R Y.

1. PROOF.—PRIOR SEPARATION.
2. DECREE OF SEPARATION.
3. PROOF OF MARRIAGE.
4. DITTO.
5. CONDONATION.
6. WIFE'S ADMISSION OF ADULTERY.
7. EVIDENCE.
8. "STUPRUM" OF WIFE BEFORE MARRIAGE.
9. COSTS.
10. CUSTODY OF CHILD.
11. CONDONATION.
12. VARIANCE.—PLEADING.
13. DOMICILE OF WIFE.—JURISDICTION.
14. PROOF OF MARRIAGE.
15. DITTO.
16. CONDONATION.

1. RICHTER *v.* WAGENAAR. ✓

[20th March, 1829.]

Insufficient proof of Adultery.—Separation affords no Defence in a case of Divorce by reason of Adultery.—“Pater est quem Nuptiæ demonstrant.”

Richter
v.
Wagenaar.

This was an action by the husband against the wife, on account of adultery by her committed.

It was proved that the plaintiff had (13th June, 1822) in respect of a promise of marriage, been decreed by the late Court of Justice to marry the defendant; that he had appealed but not prosecuted his appeal against this judgment; that

thereupon (22d August, 1822) a decree of civil imprisonment had been granted by the Court against him until he should marry the defendant; that under the pressure of this decree he had, in 1822, married the defendant in the Lutheran Church; that they had immediately separated, the plaintiff going out at one door and the defendant at another; that from that day they had never lived together, the defendant receiving a separate allowance from the plaintiff of Rds. 30 per month, paid to her by his agent.

Richter
v.
Wagenaar.

There was no evidence that after their marriage they had ever spoken to, or even seen each other, but they both lived in Cape Town.

In the end of December, 1825, Smuts proved that the defendant came to board in the house in which he and his wife lived, and left it in June, 1826, at their request, in consequence of their having observed her to be pregnant; that the only men by whom she was visited while residing in his house was a seafaring man, named McLeod, who apparently on his return from a voyage called *twice* on her in January or February, 1826, about 4 or 5 in the afternoon, the witness being present in the room with them all the time McLeod was there, and a young man, about 16, named Wagenaar, (whether a relation of the defendant or not the witness did not know), who came repeatedly.

The *Rev. Mr. Wagner*, clergyman of the Roman Catholic Church, produced the following certificate of baptism, which he had performed :—

“Cape Town, 13th May, 1827.

“I, the undersigned, declare that there is entered in the register of baptisms of the Roman Catholic Church, that in this place there was baptised Wilhelmus Johannes, son of Wilhelmus Johannes McLeod and Johanna C. Wagenaar, whose sponsors were Pieter Bresler and Elizabeth Pallida.

(Signed) “J. WAGNER, Pastor.”

and stated that the child was dangerously ill at the time, and was christened in the house in which it was; that the names of the sponsors were given in to him as entered in the certificate, but whether they were present he did not know; that he saw a man in the house, but whether this man was present in the room at the time of the baptism, he did not recollect. That they said in the house that the name of the father of the child was McLeod, but whether it was the mother of the child or the man who said this he did not recollect. He believed there were two women present. *That he did not know the defendant, even by sight.*

Brandt, the sexton of the Lutheran Church, stated that he knew the plaintiff and the defendant, and recollected their

Richter
v.
Wagenaar.

marriage. "In May, 1827, the defendant came to me to get her child buried. She in the first instance gave up the child's name as Richter, and the name of Richter as that of the father. While I was going to write down the child's name she said it was 8 months and 10 days old. While I was writing she said it had been baptised. I asked her for the certificate of baptism. She gave me one similar to that produced by Mr. Wagner. I told her that as I saw in the certificate the name of another person entered as the child's father I could not bury it under the name of her husband, Richter, and that as I knew she was married to Richter I could not bury the child under the name of the person mentioned in the certificate as the father, but that if it was entered in her own name I would bury it. She then agreed that this should be done. Bastards are buried under the name of the mother. We keep no register of burials in the Lutheran Church, but we send a report of all funerals performed to the Reformed Church. I send my written report or certificate to the grave-digger. That which I gave to the grave-digger in this case was:—'Death, 11th May, 1827, a son of Johanna Carolina Wagenaar, aged 8 months and 10 days.'"

The Court held that the plaintiff's separation from the defendant afforded her no ground of defence against an action for divorce for adultery committed during the separation (*vide* Voet 24: 2, § 7; *Barker v. Barker*, *infra* p. 265).

That there was no direct proof whatever of adultery having been committed, or even tending to prove the commission of adultery with any person in particular.

That the proof of the adultery in this case therefore depends entirely on the proof that the child was illegitimate. The question therefore which the Court have to try is, whether the child was illegitimate, so that he could not have succeeded to Richter as being his son and heir.

The Court held that this question must be tried, notwithstanding the death of the child, as if it had been between the child and a third party, disputing his legitimacy.

That a very strong presumption of non-intercourse between the husband and wife arises from the conduct of the parties; but still this is merely a presumption, there is nothing in this case like positive proof of non-intercourse. They might have met.

It has been argued for the plaintiff that there is not only a strong presumption of non-intercourse arising from the facts of the case, but in corroboration of it there is the acknowledgment by the defendant herself of the adultery, and that another person than her husband was the father of the child. But from the authority of Voet 1: 6, § 7, it is clear that the mother's confession of adultery, made even on oath, would

not be received as proof sufficient to bastardize her child. It is therefore clear that declarations made by the defendant, however strong, would not be sufficient *per se* to bastardize the child. It might, indeed, have been somewhat a more difficult question to determine *if, in corroboration of the facts now in proof*, it had also been proved that the defendant had declared McLeod to be the father of the child under circumstances of peculiar solemnity, *e.g., while in labour*, or at its baptism. But in this case there is no sufficient evidence of the defendant having made any such declaration on either of these solemn occasions.

Richter
v.
Wagenaar.

The Court have not the best evidence as to the facts stated in the certificate of baptism, for Bresler and Pallida, the sponsors, might have been found and produced,—who would have put the identity of the persons who were in the room when the baptism was performed, which is at present questionable, and the correctness of the other statements in the certificate, beyond a doubt. The plaintiff, or his agents, might have had this proof if they had taken the trouble to search for it.

As the defendant applied to the sexton to have the child buried under the plaintiff's name, and not as the child of McLeod, it is in vain to contend that the defendant has made the tenor of the certificate her own. She was forced by the sexton to produce it. There is no evidence that she in any way directed or instructed Mr. Wagner, at the time of the baptism, as to the form or contents of the certificate.

There is nothing therefore in this case but a *probability* of adultery, in consequence of the presumption of non-intercourse, which arises from the feelings which the parties are proved to have entertained to each other, and their conduct subsequent to the marriage.

The Court therefore (Kekewich, J., absent on Circuit) granted the defendant an absolution from the instance, with costs (*vide* Barker v. Barker, *infra*).

2. BARKER v. BARKER. ✓

[25th September, 1829.]

Divorce on the ground of Adultery of the Wife is not barred by a Decree of Separation "a Mensâ et Thoro."—What constitutes sufficient proof of Adultery.

This was an action instituted by the plaintiff against his wife, Mary Anne Barker, or Frost, for a divorce *a vinculo matrimonii*, on the ground of adultery. The defendant, for

Barker
v.
Barker.

Barker
v.
Barker.

whom no appearance was made, being absent from this colony, had been duly cited by edict.

The plaintiff called

Jessy Eyre, who gave the following evidence:—"I am the sister of the defendant, who is married to the plaintiff. After their marriage they lived for some time in the same house with my husband and me. They had many quarrels. The plaintiff then removed with the defendant to a boarding-house. After this the defendant instituted legal proceedings against him for a separation *a mensâ et thoro*. After doing so she returned without her husband to live with us. Soon after she went with us to live in the house of John Duke Jackson, in which my husband had hired apartments. She continued to live with us there for about nine months, and until the 20th December, 1824, the day of the great eclipse, on which day she left this colony in a ship for England. She has never since returned here. From the time the defendant came to live with us, after commencing the proceedings for a separation until she left the colony, I never saw her and the plaintiff together on any occasion. She was afraid to see the plaintiff. I am certain that she never spoke to the plaintiff during the above period. She declared in public Court that he had completely alienated himself from her affections by his improper conduct. The plaintiff's conduct was inconsistent; sometimes he expressed a wish that she should reside with him, at other times he was outrageous against her. She left the colony in consequence of an officer of the Court having called on her, on the 19th December, and said he had a warrant against her, at the plaintiff's instance, to put her in prison. She left the colony next day clandestinely, without getting the colonial passport. Jackson had been in the habit for two or three years of taking his meals at our table, and during the nine months we lived in his house he and our family lodged and boarded together. The parlour was a common sitting-room for all the party, including Jackson. I saw no particular intimacy between Jackson and the defendant; he was on a friendly footing, he was the friend of my husband. He left the colony after the death of my husband, about four years ago."

The plaintiff put in, 1st. Sentence of the late Court, awarding a separation *a mensâ et thoro*, between the parties, dated 20th May, 1824. 2dly. Notarial instrument proving the plaintiff's offer to the defendant to fulfil the conditions, prescribed in said sentence as those on which they might live together, and her refusal, dated 28th and 29th June, 1824. 3dly. Depositions taken before the Lord Mayor, of London, sworn by Charles Steuart, William Strut, Elizabeth Barker, and Elizabeth Burgess, which proved that on the 28th August, 1825, the defendant had been delivered of a female child, at

Norwood, in Surrey, in England. 4thly. Deposition taken before one of the magistrates of Edinburgh, sworn by Charles Phin, Session Clerk of the said city, proving an extract from the register of marriages of the registry of a marriage entered into between John Duke Jackson, of Norfolk, and Mary Anne Barker, by declaration made by them on the 26th October, 1826, before James Hill, a Justice of the Peace, in the presence of the said Charles Phin, and another witness, and that the said extract was in every respect true. 5thly. Deposition, sworn before Mr. Justice Kekewich, by Lawrence Witham, who is now absent from the colony, proving that in the latter part of 1826, he saw the said John Duke Jackson, formerly of Cape Town, in Edinburgh.

Barker
v.
Barker.

The Court were of opinion that the birth of the child by the defendant was proved, and that circumstances had been proved necessarily leading to the conclusion that this child had not been begotten by the plaintiff. Consequently, that the adultery had been proved (*vide Richter v. Wagenaar, supra* p. 262), and therefore, without expressing any opinion as to the sufficiency of the evidence to prove the illegal marriage between the defendant and Jackson, gave decree of divorce, as prayed.

3. LEHANE v. LEHANE.

[3d June, 1830.]

Absolution from the instance by reason of failure of proof of the Marriage.

This action was brought by the husband against the wife for a divorce, on the ground of adultery.

Lehane
v.
Lehane.

The defendant had not entered appearance.

The Attorney-General, for the plaintiff, proved, by affidavits, the service of the requisite notices to entitle him to have the cause tried this day by default, and called Robert Taylor and his wife, who proved the adultery. The plaintiff failed to prove his marriage. The defendant was absolved from the instance.

4. CROESER v. CROESER.

[3d Dec., 1830.]

Proof of Marriage.

This was an undefended action by the plaintiff, the wife, for divorce, on the ground of adultery, committed by the

Croeser v.
Croeser.

Croeser
v.
Croeser.

defendant, her husband. The evidence adduced by the plaintiff clearly proved the adultery. But no evidence was given to prove the marriage.

The case was allowed to stand over, to give the plaintiff time to produce proof of marriage.

This day (16th December), De Wet, for the plaintiff, produced a certificate of the marriage of the parties, which Mr. F. N. Staedel proved to be under the hand of Mr. Spyker, the officiating clergyman at Zwartland.

Judgment for the plaintiff, as prayed.

5. DE WET (THE WIFE) v. DE WET (THE HUSBAND).

[6th June, 1833.]

Cohabitation for two or three days after a knowledge of the Husband's Adultery by the Wife is not proof of Condonation.

De Wet (the
Wife)
v.
De Wet (the
Husband).

This was an action brought by the plaintiff for a divorce *a vinculo matrimonii*, by reason of adultery, committed by the defendant, her husband.

In his plea the defendant 1st, denied the adultery; and for a further plea stated that even if the plaintiff should be able to prove the adulterous intercourse, set forth in the declaration, yet the plaintiff ought not to have or maintain her aforesaid action, because, after the time in the declaration mentioned of the committing of the said supposed adultery, the plaintiff forgave the defendant,—and was reconciled to and cohabited with him.

The plaintiff, in her replication, denied the facts alleged in the plea, and joined issue thereon.

At the trial the Attorney-General, for the defendant, admitted the fact of the adultery as set forth in the declaration, (*sed vide* Wylde v. Wylde, *infra* p. 269,) and thereafter the defendant and the plaintiff called evidence respectively to prove and rebut the defence stated in his plea, founded on the alleged reconciliation of the parties, and their cohabitation subsequent to the plaintiff's knowledge of the adultery.

Cloete argued in support of the defence of reconciliation, and offered the defendant's oath as to *concubitus*. Voet 24: 2, § 5.

Brand, *contra*, quoted Van Leeuwen, Cens. For., pt. I., l. 1, c. 15, § 7; De Haas' New Dutch Consultations, p. 444; Burn's Ecclesiastical Law, vol. 2, voc. Adultery; and offered the oath of the plaintiff that no *concubitus* had taken place.

[Cur. Adv. Vult.]

Postea (13th June, 1833).—The Court gave judgment for the plaintiff, as prayed, with costs. De Wet (the Wife)

The Court held that there was no direct and positive evidence of reconciliation between the parties, that there was no proof of *concubitus*, and that neither *reconciliation* nor *concubitus* was to be presumed, in law, from the bare fact of subsequent cohabitation for two or three days, and that this was more especially true under the particular circumstances of this case, as proved in evidence. De Wet (the Husband).

That there was no necessity for the plaintiff's oath in supplement, because the *onus probandi* reconciliation lies on the defendant, who has failed entirely in his proof, and the defendant is not entitled to give his oath in supplement as to *concubitus*, because he has brought no *semiplena probatio* of it, and because if there had been *concubitus*, he might have proved it by servants or slaves in the house.

6. WYLDE v. WYLDE.

[6th July, 1835.]

The Wife's admission in her Plea of having committed Adultery, is not sufficient proof "per se" of the Adultery.

This was an action brought by the plaintiff, the husband, against the defendant, his wife, for a divorce *a vinculo matrimonii*, on the ground of adultery. Wyld v. Wyld.

The declaration set forth the marriage of the parties in England, in 1805, that they lived and cohabited together from their marriage until February, 1825, when the plaintiff left New South Wales, where they were then living, for England, with her consent; that the plaintiff remained in England, from his arrival there, in 1825, until September, 1827, when he sailed for and came to this colony, where he has ever since constantly resided. That the defendant continued constantly to reside in New South Wales from February, 1825, until February, 1835, when she embarked on board a vessel bound to this colony, where she arrived on the 27th of May last, wholly without the previous knowledge on the part of the plaintiff, of any such purpose or design on the part of her, the said defendant, or of the said purpose and design having been carried at all into effect, till a few days before the arrival of the said defendant in Table Bay. That from February, 1825, until the 19th June, 1835 (the day on which the declaration was filed), the plaintiff has been wholly separated from, and has never lived with,—had sight of—or cohabited with the defendant. That the defendant, during the term of the

Wylde
v.
Wylde.

said separation and non-cohabitation between the plaintiff and the defendant, and while she so lived and resided separate and apart from her husband, the plaintiff, in New South Wales, became pregnant and gave birth to a female child, on or about the 30th April, 1828.

The defendant, on the 30th June, filed the following plea :

The defendant denying all and all manner of confederacy, collusion, or transaction with the plaintiff, her husband, and with any and every other person, as to or in respect of this her plea or answer, doth admit and willingly and voluntarily confess before this honourable Court that all the allegations and statements respectively made and set forth in the claim or declaration of him, the said plaintiff, are true and well founded in fact,—being ready and willing to make and tendering judicial confession thereof,—and she, the said defendant, doth therefore admit that he, the said plaintiff, is entitled, in law and justice, to the judgment of this honourable Court, as prayed, against her, the said defendant, and doth hereby submit to the same.

At the trial, Cloete, for the plaintiff, moved for judgment for the plaintiff, as prayed, in respect of the defendant's admission and confession recorded in her plea; and in support of this motion he quoted the Ordinance No. 72, §§ 28, 29, and 36, and maintained that the provisions of those clauses applied to the present case. Van den Berg, *Nederlandsch Advys Book*, vol. 1, Consultation, 118; De Haas, *Nieuwe Hollandsche Consultation*, Casus. 35: Van der Linden's Institutes, b. 1, c. 17, § 4, pp. 261, 262; Voet 24: 2, § 8; Voet 42: 2, §§ 1 and 6; Van Leeuwen, *Cens. For.*, pt. I., b. 5, c. 26, § 12; Placaat, 18 March, 1656, § 79; Merula, *Man. van Proced.*, l. 4, t. 62; and the case of *De Wet v. De Wet*, p. 268, *supra*.

Brand, for the defendant, stated, that he was not instructed and did not mean to oppose the motion of the plaintiff; on the contrary, that he was instructed by his client again judicially to admit the facts alleged by the plaintiff.

[*Cur. Adv. Vult.*]

In the course of the above discussion it was observed that in the summons and declaration, the 30th April, 1828, had been erroneously inserted as the date of the birth of the child, instead of the 30th April, 1829. On the same day the plaintiff took out a summons, calling on the defendant to show cause before a Judge at chambers, why the plaintiff should not be allowed to amend his summons and declaration, by inserting the 30th April, 1829, in place of the 30th April, 1828. Whereupon, by consent of both parties, the Judge made an order, dated 6th July, that the plaintiff be allowed

to amend his summons and declaration in manner above stated, and that the defendant be allowed to amend her plea filed herein accordingly. On the same day the summons and declaration were amended accordingly, and on the plea was indorsed by the defendant's attorney "Repleaded this 6th day of July, 1835," and it was marked by the registrar as having been refiled on that day.

Wylde
v.
Wylde.

Postea (1st August, 1835).—This day, the Court (Menzies, J., and Kekewich, J.,) gave the following judgment:—

By the law of this colony, marriage is not dissoluble by consent of parties, but on the ground of adultery, which must be proved to the satisfaction of the Judge. Voet 24: 2, §§ 5 and 8; Van Leeuwen, Cens. For., pt. 1., b. 5, c. 26, § 12; Brouwer de Jure Conn., Lib. 2, c. ult., § 6.

It has been contended that confession on record is judicial confession, and that judicial confession is full proof, and in support of this the plaintiff has quoted Voet 42: 2, § 6, and Ordinance No. 72, § 36; but what is the confession in this case proof of? Merely of the defendant's willingness to admit the plaintiff's allegations, and to allow him to obtain the dissolution of the marriage. It cannot be deemed *full proof* to the Judge that adultery has really been committed. See Williams v. Williams, 1 Hagg. 304; Searle v. Price, *id.*, 2: 189; Burgess v. Burgess, *id.*, 2: 227; Mortimer v. Mortimer, *id.*, 2: 316.

That confession ought not to be received as full proof is proved by what has occurred in this very case. In the summons and declaration the birth of the child was stated to have taken place in April, 1828, and the defendant, in her original plea, admitted this to be the fact. Whereas the pleadings having been amended, it is now alleged in the declaration that the birth took place in April, 1829, and to this amended declaration the very same plea has been filed. This is said to have happened by a mere verbal mistake. But if this Court on the 6th July last had yielded to the plaintiff's arguments, and acceded to this application for judgment, this marriage would have been *dissolved on the ground of an alleged act of adultery, which had never taken place.*

In dissolving marriage there must be *no mistakes.*

Reference has been made by the plaintiff to the case of De Wet v. De Wet, *supra* p. 268, but, in the first place, the circumstances of that case are very different from the present. There was in it real evidence that the defendant was most anxious that the marriage should not be dissolved, and it was impossible to account for his conduct long previous to the institution of the suit, except on the supposition that he had been detected in the act of adultery. The Court proceeded not so much on the defendant's own admission of his having

Wylde
v.
Wylde.

committed adultery, as upon the declaration of the Attorney-General of the colony, that, having investigated the evidence he found that he could not resist the charge of adultery against his client, and was forced to betake himself to another defence. But it is enough to say, with respect to that case, that in it the Court were surprised into suffering positive evidence of the adultery to be dispensed with,—that they are of opinion that what was then suffered to be done was wrong,—that it was a bad decision,—and that the Court neither will, nor ought to follow that case as a precedent.

The marriage in this case was celebrated in England, between natives of England. The law of England would not dissolve marriage on confession, nor unless the plaintiff had previously obtained a verdict for damages against the adulterer. The plaintiff cannot, therefore, maintain that the principles and rules of the law of this colony ought to be stretched in his favour. If the judicial confession is not sufficient evidence *per se*, its deficiency cannot be remedied by proof of extra judicial confession, which, by the law of this colony, is of much inferior value as evidence to judicial confession. (*Vide* Van der Linden's Institutes, b. 1, c. 17, § 4, p. 261; Voet 42: 2, § 8.)

The Court therefore held that it was necessary, to warrant this Court in giving decree for dissolution of the marriage, that there should be at least some direct evidence as to the birth of the child at the date alleged, and found that the plaintiff is not entitled to judgment, as prayed, in respect of the defendant's admission and confession recorded in her plea.

Thereafter (August, 1835), by order of a Judge at chambers, the plaintiff obtained a commission from the Court to examine witnesses at New South Wales.

Postea (23d February, 1836).—This day the cause was tried, when Cloete, for the plaintiff, put in the evidence, which had been taken at New South Wales, under the said commission, of

Joshua John Moore, the brother of the defendant, who proved that the plaintiff had left New South Wales in February, 1825, and had never since returned to that colony; that the defendant remained in New South Wales from the year 1825, until about the early part of this year, 1835, after the plaintiff left that colony, in 1825, and resided upon his estate with two of her children.

The witness and a Dr. Bland farther proved that in April, 1829, the defendant gave birth to a female child.

The defendant called no witnesses, and declined making any comments on the evidence produced by the plaintiff.

The Court, in respect of the evidence, gave judgment for the plaintiff, as prayed.

Divorce a vinculo matrimonii, &c. No costs.

7. WEYERS (THE WIFE) v. STOPFORTH (THE HUSBAND).

[30th November, 1835.]

The unsupported Evidence of the Woman with whom the Adultery was alleged to have been committed to be held insufficient "per se" to prove the Adultery.

The plaintiff in this case brought an action against the defendant, her husband, for a divorce *a vinculo matrimonii*, on the ground of adultery, committed by him in a house situated in the town of George, in the years 1834 and 1835, with Carolina, a house-maid of one widow Paulsen.

Weyers (the
Wife)
v.
Stopforth (the
Husband).

The defendant admitted the marriage, but pleaded the general issue.

At the trial, in the Circuit Court of George, the plaintiff called

Carolina,—"I am in the service of the widow Paulsen. I know the defendant. I lived with him in Dutton's house. I cohabited with him at nights, and had carnal connection with him; and in the day time went to my mistress's. We did so for a year both before and after the time that the commando marched from George. (This was early in 1835.) I do not live with him now. I left him about two months ago."

Cross-examined.—"Nobody promised me money to come here and give evidence. I told this to no person except to my mistress, whose permission I asked to sleep there at night."

The plaintiff closed her case.

The defendant called no witnesses, but maintained that the evidence of the party, with whom the adultery was committed, was neither competent nor sufficient to prove the plaintiff's case.

The Circuit Court removed the case to the Supreme Court for judgment.

This day, the Court held that the witness Carolina was a competent witness; but that, under all the circumstances of the case, they did not see sufficient reason to consider her to be so credible a witness, as that her single and totally unsupported evidence should be held by them to have sufficiently proved the commission by the defendant of the adultery alleged by the plaintiff; and therefore absolved the defendant from the instance.

N.B.—It having been brought to the notice of Kekewich, J., that the witness Carolina had been formerly examined in another case before him, he stated that she then gave her evidence in such a manner, that he could not believe her on oath.

NOTE.—In the Circuit Court at George, in May, 1845, Stopforth brought an action for a divorce *a vinculo matrimonii*,

Weyers (the
Wife)
v.
Stopforth (the
Husband). against his said wife, on the ground of her having committed adultery, and given birth to a child at a time when she was separated from him, and when he had no access, or possibility of access, to her. This was proved.

The Court, having observed that there was an action on the roll against Stopforth, for the aliment of a child alleged to have been begotten by him with another woman, during the subsistence of his marriage with his wife, the defendant, postponed giving judgment until that case had been decided, and his paternity of said child was clearly proved in that case.

Thereafter, in respect of the adultery proved to have been committed by the plaintiff, the Court gave decree of divorce *a vinculo matrimonii* against the defendant, as prayed, but adjudged that the defendant should remain in the undisturbed possession of all the property now possessed by her. Each party to pay their own costs.

8. NEL v. NEL.

[29th Nov., 1841.]

Previous "Stuprum" of the Wife, unknown to the intended Husband, does not give ground for an Action for Dissolution of the Marriage.—"Quære"—Whether in such case the Marriage may be declared null "ab initio."

Nel
v.
Nel.

This was an action for a dissolution of the bonds of marriage between Daniel Jacobus Nel, of Swellendam, and Maria Francina Nel, his wife on the following grounds, as set forth in the plaintiff's declaration:—That the said plaintiff and the defendant were intermarried on the 28th day of December, 1840, and cohabited as husband and wife from that date; but that the said defendant, soon after the said marriage, exhibited symptoms of pregnancy, and on the 9th of June, 1841, was brought to bed of a child, of which the plaintiff is not the father; and that the said defendant has, after the birth of the said child, admitted that, before her marriage with the said plaintiff, she had had carnal intercourse with one Cornelis Fry, by reason of which intercourse she had thus become pregnant, and had given birth to the said child. The plaintiff also averred that, by reason of the said *criminal* intercourse of the said defendant with another person before marriage, he was entitled to claim a dissolution of the bonds of marriage, which he now prayed the Court to dissolve, and to declare that he (the plaintiff) was entitled to re-marry: and that the defendant might be condemned to pay the costs of suit.

The defendant, by her attorney, excepted to the sufficiency of this declaration, and pleaded that the matters and things therein set forth, supposing the same to be true, were not sufficient, in law, to entitle the plaintiff to claim a dissolution of the bonds of marriage now subsisting between them, which question she referred to the judgment of this honourable Court. But in case the Court should determine against the validity of this exception in law, the defendant also pleaded that, admitting, as she did admit, that she and the plaintiff had been intermarried, as mentioned in the declaration, yet she denied all and singular the other allegations made in the declaration. And for a further plea in bar, in case the Court should decide against her on these two points, but not otherwise, she pleaded that the defendant ought not to maintain his said action, because after he became aware of her pregnancy, he forgave her, and continued thereafter to live and cohabit with her as her husband for a considerable length of time, to wit, for nine months, or thereabouts, which she was ready to verify.

The plaintiff joined issue with the defendant on the exception, in law, by her first pleaded, wherein she denied that the matters and things in the declaration alleged (supposing the same to be true) are sufficient, in law, to entitle the plaintiff to claim a dissolution of the bonds of marriage.

The Attorney-General argued in support of the exception in law, that the facts stated in the declaration did not afford legal ground for a divorce; and maintained, 1st, that there was no statement in the declaration which showed that the cohabitation, which occasioned the birth of the child, was an illegal or immoral one; and, for aught that appeared in the declaration, she might have been a widow; Cornelis Fry might have been her former husband, and the child his lawful child. 2ndly. That the declaration did not allege that the plaintiff, at the time of marriage, was ignorant that the defendant was pregnant by another man. 3dly. That the fact of pregnancy, and producing a child after marriage in consequence of an illicit intercourse before marriage with another man than the husband, and the ignorance of the fact by the husband before marriage, gave him no legal ground for suing for a divorce. (Van der Linden, Inst., b. 1, c. 3, § 9, pp. 88, 89.) That the plaintiff has alleged in his declaration that this was a legal marriage, celebrated between the parties, which still subsists, and which he prays may be dissolved; while the only effect attributed to such facts as the plaintiff here founds on, as affording grounds for a divorce, even by those who attribute any effect to them is, that the ignorance of the intended husband of these facts, is such an error in *essentialibus*, as annuls the contract totally and *ab initio*. Therefore the plaintiff must fail in his present action, unless he can prove

Nel
v.
Nel.

Nel
v.
Nel.

that such pregnancy and delivery of a child is a ground not for annulling a marriage as having been null and invalid *ab initio*, but a ground for dissolving a legal marriage, such as adultery is. He quoted Voet 24: 2, §§ 5, 15; Stair's Institute, b. 1, 4, § 6, Huber Præl. l. 24, 2, § 18.

Cloete, *contra*, quoted Voet 23: 1, § 13; Van Leeuwen, Cens. For., pt. I., l. 1, c. 15, § 10.

The Court were of opinion that, whether the previous *stuprum* and pregnancy of the wife, unknown to the intended husband, might or might not entitle the husband to an action to have the marriage declared to have been null *ab initio*,—upon which question they gave no opinion,—they clearly were not grounds on which the husband could sue to have the marriage dissolved by a decree of divorce. But that it was unnecessary to give judgment on this ground, because they held that there were good grounds for excepting to the declaration, because it neither avers previous *stuprum* on the part of the wife, nor that the husband was ignorant of it at the time of the marriage.

Exception allowed, with costs.

9. HABLUTZEL v. HABLUTZEL.

[8th November, 1842.]

Costs given against the guilty Wife in an Action for Divorce, by reason of her Adultery.—The Court held that if the Defendant was entitled to no Estate,—either separate or as her share of the Community,—her Attorney would be entitled to have his Costs, incurred before the Decree, out of the Common Estate.

Hablutzel
v.
Hablutzel.

This day (8th November), the Court (Menziés, J., absent on Circuit) gave decree of divorce in favour of the plaintiff against the defendant, his wife, on the ground of adultery, by her committed.

The question as to costs to stand over for further argument.

This day (10th November), Cloete, for the defendant, maintained that by the divorce the defendant forfeited only her dowry and not her share in the goods in communion. That the marriage, and consequently the communion of goods, continued undissolved up to the very instant that the decree of divorce was pronounced, and therefore that all costs, incurred before the decree by both parties, were debts due by the common estate, and ought, before it was divided between the parties, to be paid out of it, along with all other debts due by the spouses before the marriage was dissolved by the

decree, and that for this reason, even if it should be held that by the divorce the wife forfeited her share in the goods in communion, the costs incurred by her before decree must be paid by the husband, and that if she thus forfeited her share in the goods in communion, she ought not to be condemned to pay the plaintiff's costs, seeing that then the decree of divorce, *ipso facto*, deprived her entirely of the means of doing so. And in proof that the decree of divorce did not operate against the wife as forfeiture of her half of the goods in community, he quoted the Sequestrator's Instructions, § 56; Van Leeuwen, Cens. For., pt. I., l. 1, c. 15, § 9; Voet 24: 2, § 9; Voet 23: 2, § 8.

Hablutzel
v.
Hablutzel.

The Attorney-General, *contra*, quoted Voet 48: 5, § 11; Van Leeuwen's Comm. p. 424; the Judgment of the former Court of Civil and Criminal Justice, in the case of Robertson v. Robertson, 13th May, 1816, in which the defendant was condemned to pay all the costs. (Cloete stated that this judgment was not in point as it was given *propter contumaciam*.) He also quoted cases decided in this Court, in which decree of divorce was given in favour of the plaintiff, as prayed, with costs.

The case was ordered to stand over until the Court should be full by the return of Menzies, J.

Postea (29th November, 1842).—The parties were further heard, when Cloete maintained that the uniform practice of the Dutch Courts was to refer the whole of the common estate to the Sequestrator, and to charge all the costs of the action for the dissolution of the marriage on the said estate.

The (full) Court gave judgment in favour of the plaintiff, for his costs; but refused on so summary a form of proceeding as the present application, to decide any of the other questions which had been raised, leaving it to the plaintiff to recover his costs either out of the defendant's separate estate, if she should be found to have any, or out of her share of the goods in communion, if she should be found entitled to any share thereof, and leaving it to the defendant on the division of the common estate, if to such she should be found entitled, to make such claim on that estate as she should be advised she was entitled to.

There seemed to be no doubt in the mind of any of the Court that the defendant's attorney, if she was not entitled to any share in the common estate and had no separate estate, would be entitled to claim payment from the plaintiff, out of the common estate, of all costs incurred by him in conducting the defendant's defence, before the decree of divorce was pronounced.

Cloete, for the defendant, stated his intention to bring the question regularly before the Court for decision.

10. FARMER v. FARMER.

[26th November, 1842.]

After a Divorce for Adultery the innocent Wife held entitled to the Custody of a Boy,—the offspring of the Marriage,—of six years old.

Farmer
v.
Farmer.

This was an application by W. Farmer, who had been divorced from his wife by a judgment obtained by her on account of adultery, to have the charge and custody of his son, a child under six years of age (born 26th December, 1836), at present under the charge and in custody of his mother, the respondent.

The Attorney-General, for the applicant, admitted that up to three years of age the mother should have the custody and charge of the child, but that after that age the father is entitled to the custody of the child.

But on being referred to the Cod., L. 5, tit. 24 *lex unic.*; Perezius *ad Dict. Titulum*, § 2, and Voet 25: 3, § 20, he admitted he could not maintain that the law is not as therein laid down, and that he could not make out a special case either that there was anything in the conduct of the mother, which rendered her unfit for the care of the child, or any thing or circumstance which made it more for the advantage of the child that he should live with his father than his mother.

On these grounds the Court, without calling on the respondent, refused the application, with costs.

11. VAN DYK v. VAN DYK.

[21st November, 1843.]

Delay of a Separated Wife for twelve years after her knowledge of her Husband's Adultery before bringing her Action for a Divorce, held not to constitute Condonation.

Van Dyk
v.
Van Dyk.

This was an action brought by a wife against her husband, for a divorce, on the ground of adultery, by him committed.

It was proved that the parties had been married on the 4th April, 1813, and had, by a decree of the late Court of Justice, been separated *a mensâ et thoro* on the 23d April, 1821, since which time they had lived separate and never cohabited. That in August, 1829, the defendant began to cohabit with one Anna Maria Endus, with whom he continued to live as man and wife, until her death, in April, 1839, during which

cohabitation he had four children by her, and that the defendant's adulterous cohabitation with Endus was well known to the plaintiff.

Van Dyk
v.
Van Dyk.

The Chief Justice and Menzies, J., held that there was no evidence of collusion between the parties, and that as the delay on the part of a wife, judicially separated from her husband, to commence proceedings for a divorce after she was aware of his having committed adultery, however long the period of delay might be, did not, in law, constitute condonation of the adultery; this delay was no bar to her now bringing the present action. They therefore gave decree of divorce, as prayed.

Musgrave, J., *dissentiente*, on the ground that there had not been evidence produced to convince him that there had not been collusion or condonation, which he appeared to consider requisite under the circumstances of the case, viz., the defendant having made default, and this action not having been brought until twelve years after the plaintiff first had knowledge of the adultery.

12. GNADE v. GNADE.

[28th May, 1844.]

Variance between the description in the Declaration and the Proof of the person with whom the Adultery was alleged to have been committed.

In this case, which was an action at the instance of a wife for a divorce, on the ground of adultery, committed by her husband. After the evidence had been concluded a doubt arose whether the defendant was not entitled to absolution, in respect of the variance between an allegation in the declaration and the fact, as proved by the evidence, viz., that in the declaration the woman named Maria Louisa Johanna Kirsten, with whom the defendant was alleged to have committed adultery, was designated *the sister of the half-blood of the plaintiff*, without any further designation or description whatever, and the Maria Louisa Johanna Kirsten, with whom the defendant was proved to have committed adultery, was proved not to be a sister or half-sister of the plaintiff, either by consanguinity or affinity.

Gnade
v.
Gnade.

Judgment was reserved.

Postea (30th May, 1844).—The above objection was withdrawn by the defendant, and judgment postponed by consent. The case to stand over till next term, there being reason to expect a reconciliation between the parties.

Gnade
v.
Gnade.

Postea (6th August, 1844).—On the motion of the plaintiff, the defendant not appearing, the Court gave decree of divorce, as prayed, except as to the first alternative prayer that the defendant should be decreed to have forfeited his share of the goods in communion, as to which the Court gave no decision.

✓ 13. BESTANDIG v. BESTANDIG.

[25th February, 1847.]

The Domicile of the Husband is the Wife's Domicile, although she be personally absent from the place of the Husband's Residence.—Jurisdiction under section 30 of the Charter of Justice.

Bestandig
v.
Bestandig.

This was an action brought by Bestandig, the husband, against his wife, on the ground of adultery.

An edictal citation had been issued against her, as defendant in this action, and had been personally served on her in Calcutta.

She had granted a warrant to an attorney of the Supreme Court to enter appearance for her, and to defend the action; and a plea had been filed for her, in which she admitted the marriage, and *quoad ultra* pleaded the general issue; and at the trial Ebdon appeared as her counsel.

It was admitted that the parties, both natives of this colony, were married at Natal, from whence they soon after returned to this colony, where they lived together for some years as man and wife.

It was proved, by the evidence taken under a commission issued for that purpose by this Court, and produced by the plaintiff at the trial, that the defendant had left this colony clandestinely, in a ship bound for Calcutta, in collusion with a Mr. Samuel Palmer, who had sailed for Calcutta a few days previously in another ship. That on her arrival at Calcutta she proceeded direct to Mr. Palmer's house, and continued to live with him in a state of open adultery.

No evidence was produced by the defendant.

The Attorney-General, in support of the jurisdiction of the Court, notwithstanding that the defendant was out of the colony, quoted 1 Burge's Colonial Law, p. 35; Voet 5: 1, § 95; and the following cases decided in this Court, viz., *Barker v. Barker*, p. 265, *supra*; *Reeves v. Reeves*, p. 244; *Campbell v. Campbell*, p. 252.

Ebdon, for the defendant, made no reply.

Musgrave, J., held that in respect that the defendant was not personally within the colony, the Court, under the 30th section of the Charter, had no jurisdiction in this cause.

The Chief Justice and Menzies, J., held that this colony was the domicile of the husband, and that notwithstanding the personal absence of the wife from the domicile of her husband, the latter is, in law, held to be the domicile of the wife, more especially in questions of personal *status* arising out of the relation of marriage of the parties; and that therefore the Court had jurisdiction in this cause, in virtue of the 30th section of the Charter; and gave decree of divorce, as prayed for.

Bestandig
v.
Bestandig.

14. HOFFMAN v. HOFFMAN.

[12th June, 1847.]

Proof of Marriage in an Action for Divorce.

In this case, which was an action at the instance of the wife against her husband, for divorce, on the ground of adultery,—the Attorney-General, for the plaintiff, to prove the marriage, called

Hoffman
v.
Hoffman.

Elizabeth Bosman, who stated,—“I have known the plaintiff ever since she was a child, and I know the defendant. I lived in Stellenbosch in 1823. The plaintiff and the defendant were married in July, 1823, at Stellenbosch, on the same day that I was married. I saw them go into the church to be married, in their wedding clothes. I saw them return out of church together. I went into church immediately after them to be married, and was married by the Rev. Mr. Borchers, then minister of Stellenbosch, who is since dead. After this they lived together as man and wife for many years. I visited them, and often dined with them. He called her his wife. Ten years afterwards, in 1833, they separated for a few months and then came together again and lived together as man and wife ever since till just before the commencement of this action.”

Ebden, for the defendant, maintained that this was not proof of the alleged marriage sufficient to support this action.

The Court held that it was sufficient *prima facie* evidence of the marriage to support an action for divorce on the ground of adultery.

15. KEMBALL v. KEMBALL.

[8th February, 1848.]

Proof of Marriage in an Action for Divorce.

In this case, which was an action at the instance of the wife against her husband, for divorce, on the ground of adultery,

Kemball v.
Kemball.

Kemball
v.
Kemball.

the Court held the following evidence to be sufficient proof of the marriage to support the action:—

Frederick Kemball.—"I am the son of the plaintiff and the defendant. I am 14 years old. I have lived constantly with and been brought up by my father and mother. We have been in this colony about four years. We lived in Suffolk before we came out. My father and mother have always lived together as if they were husband and wife. My father has always spoken of her as his wife."

Benjamin Norden.—"As agent for Mrs. Moore I let the 'Globe Tavern' to the defendant. He then represented himself as a married man. I made inquiry and found he had been living in different places with the plaintiff, as his wife. I afterwards summoned him for the rent. He made a counter-claim for £2 10s., as the price of a gown sold by his wife, the plaintiff, to Mrs. Moore. This sum was allowed him as a deduction from the rent."

16. WASSERFALL v. WASSERFALL.

[30th August, 1848.]

Decree not granted by reason of the Husband's delay in bringing his Action after his knowledge of the Wife's Adultery.

Wasserfall
v.
Wasserfall.

This action was brought by the plaintiff against his wife for a divorce *a vinculo matrimonii*, by reason of adultery, committed by her.

The declaration set forth that the plaintiff and the defendant were lawfully married together on the 21st February, 1836, and that afterwards, at divers times, between the 9th July, 1844, and the 15th May, 1848, the defendant had, at Cape Town, committed adultery, with one Henry Home West.

No appearance was made for the defendant.

After proving the marriage of the parties the plaintiff called *Jacob Durand Conradie*.—"I know the plaintiff and the defendant. The defendant is my wife's cousin. I know Henry Home West. I know he and the defendant lived together in my house as man and wife. This began in 1846. They continued to do so for seventeen or eighteen months. They slept in the same bed, and she had a child during that period. The plaintiff was never there during that time. I think he lived in Cape Town, with his mother, and also for a short time in the country. The plaintiff and the defendant had lived together as man and wife for several years after

their marriage, but the defendant had parted from her husband seven or eight years ago. The plaintiff must have known that the defendant and West were living together, because his lawful children by her, who lived with him, used to visit the defendant both in my house and in the house in which they had previously lived. The children came frequently. West and the defendant are still living together. They live in a house next door to mine."

Wasserfall
v.
Wasserfall.

The plaintiff closed his case.

In consequence of some doubt having been expressed on the bench whether the plaintiff's having delayed so long in commencing proceedings for a divorce, and his having allowed his children to visit the defendant, when he knew that she was living in a state of adultery with West, did not amount to condonation, or at least was not sufficient now to bar him from seeking a divorce; the farther hearing of the case was postponed to enable the plaintiff to bring such other evidence as he might think fit in explanation of his conduct. (*Vide* Burge's Colonial Law, vol. 1, p. 659; *Van Dyk v. Van Dyk*, *supra* p. 278.)

BOOK III.

IN RE BARKER.

[10th Jan., 1828.]

*Notary, under Section 21 * of Charter (1828) when entitled to be admitted as an Attorney.*

The Court held that the words "*now entitled to practice*," in *Re Barker*. in the Charter, could not be applied to any time previous to the day when the Charter passed the seals; and that, as on that day the applicant was not entitled to practice as a notary, although he had been so from 1st January, 1826, till 1st July, 1827, he was not entitled to be admitted an attorney, under the 21st section of the Charter.

VUURMAN v. SEARLE.

[31st January, 1828.]

1. *Jurisdiction of the Supreme Court under Section 32 of Charter (1828).*†
2. *Effect of Proclamation of 24th July, 1797, and 5th April, 1816, as to jurisdiction of inferior Courts.*
3. *Ordinance No. 33, effect as to same.*

In this case, Hofmeyr, for the plaintiff, objected that the Supreme Court had not jurisdiction in cases of debt under Rds. 300, because the late Court were, by the Proclamation of 5th April, 1816, excluded from jurisdiction in such cases, and this Court's jurisdiction was limited by that of the former Court.

Vuurman
v.
Searle.

1. The Court held that the 32d section of the Charter gives the Court unlimited jurisdiction, in all pleas and causes; that the words "in as full and ample a manner" as the late Court had, or could exercise, do not limit the first clause of that section, giving jurisdiction *in causes*, but applied only to the second clause of that section, giving jurisdiction *over persons*.

* Section 19 of 2d Charter (1833)

† See 2d Charter (1833), § 30.

Vuurman
v.
Searle.

2. That the Proclamations, 24th July, 1797, and 5th April, 1816, only gave the inferior Courts a *concurrent* jurisdiction, in cases under Rds. 300, and did not exclude the Supreme Court.

3. That even if those Proclamations had had the effect of excluding the late Court, this exclusion ceased, and the jurisdiction revived, on the abolition of those inferior Courts, by Ordinance No. 33.

The Court therefore repelled the objection.

ROUSSOUW v. STURT.

[21st February, 1828.]

Private Prosecutor must have concurrence of Public Prosecutor to Appeal.—(Crown Trial, § 113.)*

Roussouw
v.
Sturt.

In this case, the Court dismissed an appeal against the sentence of the Court of the Resident Magistrate of Simon's Town, in a criminal prosecution for assault, brought only by the private party assaulted, on the ground that even, although the 113th section of the Crown trial constituted him a *joint* prosecutor, yet that, as he could not originally have prosecuted in the inferior Court, without the *concurrence* of the public prosecutor, he could not appeal against the sentence of the inferior Court without that *concurrence*.

COMMISSIONER FOR THE SEQUESTRATOR v. VOS.

[11th March, 1828.]

1. *What a final confirmation of Liquidation Account of Sequestrator.*
2. *Appeal under Section 56 of Charter, 1828, (Section 55 of Charter, 1833.)*
3. *What considered Sale and Delivery on Credit;—when Seller cannot reclaim Property sold and transferred by him to the Purchaser,—and when not entitled to preference for the Proceeds in the event of Purchaser's Bankruptcy.*
4. *Liability of Sequestrator, personally, in the first instance for his Costs to his Attorney.*

Commissioner
for the
Sequestrator
v. Vos.

The Sequestrator, in respect of an *interim* liquidation account of Wentzel's estate, framed by him, preferring the defendant, paid him Rds. 5000, for which the defendant granted

* Crown Trial, published 2d September, 1819.

a receipt, acknowledging to have received it under security *de restituendo*, in the event of the Court thereafter altering the ranking of Wentzel's creditors, so as to affect the preference so awarded to the defendant.

Commissioner
for the
Sequestrator
v.
Vos.

The late Court, by their sentence, promulgated 28th December, 1827, altered the ranking of Wentzel's creditors, awarded to Geyer the preference formerly awarded to the defendant, and directed the Sequestrator to alter his scheme of distribution, and to distribute the funds accordingly.

The plaintiff put in the defendant's said receipt, and the record of the said sentence, and claimed provisional sentence against him for repayment of the said Rds. 5000. But the Court, in respect of the resolution, passed by the late Court, on the 10th of March, 1825, whereby "the Sequestrator is ordered, whenever any alteration is *made** by the Court, in the scheme of distribution, of any insolvent estate, framed and submitted by him, for the approval of the Court, to submit the scheme, after being altered as directed, for a prescribed period, to the consideration of the creditors, and thereafter to present the same to the Court, for its approval and confirmation;" and finding that the scheme of distribution, as altered by the sentence of the 28th December, 1827, had not been submitted to the creditors, nor approved or confirmed by this Court,—held that the said sentence is not a final sentence, altering the original scheme of distribution of the Sequestrator; and therefore, that the condition in the receipt, in respect of which alone the defendant is liable to restore the Rds. 5000, has not yet been purified, until which event is proved to have taken place, the plaintiff cannot claim provisional sentence.

Provisional sentence was therefore refused, with costs.

[The same decision was given, on the same grounds, in *re* Sequestrator v. Woutersen, 1st April, 1828; Nisbet & Dickson v. Richardson, 1st April, 1828, *vide infra* p. 298.]

But thereafter (19th December, 1828), the Sequestrator having proceeded in the principal case to enforce his claim for restitution against the defendant,

Joubert, for the Sequestrator, maintained that the construction put by the Court on the resolution of 10th March, 1825, in giving the decisions above reported, was erroneous, and the effect therein given to it improper, and that this error had proceeded from the mistranslation which had been given to the Court of the word in the resolution "*ordonneeren*," which had been translated "*made*," instead of "*ordered*," or "*adjudged to be made*."

* In Dutch,—"*Wanneer veranderingen in de concept verdeling door den Raad mogt worden geordonneerd*," i.e., ordered.

Commissioner
for the
Sequestrator
v.
Vos.

That the resolution only applied in cases, when the Court intended not to give a final judgment as to the entire distribution of the estate, but merely to direct the Sequestrator to alter his scheme of distribution in some particular, and was framed, in order to prevent the Sequestrator, *under pretence* of such *interlocutory* sentence, from actually distributing the whole estate before the creditors had had an opportunity of seeing the alteration, and before the Court *had finally approved* of the *whole scheme*;—and was never meant to apply to cases like the present, in which the Court, *tota re perspecta et omnibus partibus auditis*, intended to give a final judgment, deciding the whole ranking of the claims of the different creditors, although in doing so they had altered, in some respects, that proposed by the Sequestrator.

And in elucidation, he referred to the words used in this sentence, which did not direct the Sequestrator to alter the scheme of distribution according to the rules or principle laid down in that sentence, but *ordered* him to *regulate* the *distribution* accordingly, and contrasted those words with the words used in the sentences, admitted to be only *interlocutory*, previously given in the same estate.

On these grounds, he contended that the sentence of the 28th December, 1827, was, in law, a final sentence, and, therefore, that it was not competent for the Court to open it up and try the case anew. (*Vide* Sequestrator's Instructions, §§ 48, 53.)

Denyssen, for the defendant, maintained the contrary, and farther contended that, even although the sentence in question was a final sentence, in so far as the late Court of Justice could give a final sentence, yet that as this sentence was pronounced on the 28th December, 1827, only three days before the abolition of the late Court of Appeals, to which, by the former law, the defendant would have been entitled to appeal against it, and would have had a period of ten days allowed him to lodge his appeal, and as the jurisdiction of the late Court of Appeals had been transferred to this Court by the 56th section of the Charter, and as neither by the Charter, nor by any rule of Court, had any limited period been fixed, within which cases, which might have been brought before the former Court of Appeals, might be brought before this Court, as representing that Court, he was entitled now to bring this sentence under the review of this Court, by way of appeal.

1. In consequence of the arguments of Joubert, the Court saw very strong reasons for doubting, that they had been warranted in denying to this sentence, the effect of a final sentence, merely because the scheme of distribution, framed in obedience to it, had not been submitted to the creditors, and thereafter again submitted for the approval of the Court.

2. But the *Court held*, that it was unnecessary to decide this point, because the Court were satisfied, by the argument of Denyssen, that, under the circumstances relied on by him, the Court, as representing the late Court of Appeals, were entitled and bound to review this sentence by way of appeal, and to alter or reverse it on any grounds, on which it might lawfully have been altered or reversed by the late Court of Appeals. (*Vide* Woutersen's Executors, q.q. Palmer, v. Nisbet & Dickson, 15th December, 1829.)

Commissioner
for the
Sequestrator
v.
Vos

The Court, therefore, on the 19th December, 1828, proceeded to hear and determine the case on its merits. The facts were as follows :—

3. Wentzel had, by a letter, dated 21st June, 1821, agreed with Geyer to purchase from the latter 100 leaguers of wine, to be paid for by a bond, payable at three years, from the 1st September, 1821.

On the 30th June, 1821, Wentzel received from Geyer delivery of 1113 gallons of wine, which were thereafter shipped by Wentzel to the Mauritius, in the *Alacrity*.

On the 7th and 10th January, 1822, Wentzel received from Geyer delivery of 18 pipes of wine, which were thereafter shipped by Wentzel in the *Nautilus*, which sailed from Table Bay on the 2d February,—on which day Wentzel's estate was taken possession of by the Sequestrator, as being insolvent.

Wentzel had not granted any bond for the price of the wine.

On the 2d February, Geyer wrote to the Sequestrator, informing him of the above transactions between him and Wentzel, and that the 18 pipes were in the *Nautilus*, which had sailed that day, and requested him, in his official capacity, to take the necessary steps for his (Geyer's) interest.

Return cargoes, purchased by the consignees with the proceeds of the wine, shipped both in the *Alacrity* and in the *Nautilus*, thereafter came into the possession and under the administration of the Sequestrator, who refused to prefer Geyer on the proceeds of those cargoes, and by an *interim* scheme awarded the preference to the defendant, and paid him the amount of the proceeds, under security *de restituendo*, if the Court should decide against this preference.

The late Court of Justice, by their sentence, dated 28th December, 1827, altered this scheme, and awarded to Geyer :

1st. A preference on the proceeds of the wine shipped in the *Alacrity*, for Rds. 805, being the amount of the price due to him by Wentzel, for that parcel of wine; and

2dly. A preference on the proceeds of the 18 pipes, shipped in the *Nautilus*, for Rds. 4193 6 sk. 2 st., being the full amount of the proceeds of the cargo, which was the return for those 18 pipes, although the price due by Wentzel to Geyer for 18 pipes was only Rds. 1425.

ommissioner
for the
sequestrator
v.
Vos.

In respect of this sentence, the Sequestrator sued the defendant for restitution of the sum, which had been paid him in the manner above mentioned, and this Court having decided that, as representing the late Court of Appeals, they were entitled to alter or reverse this sentence, on any grounds on which it might have been altered or reversed by the late Court of Appeals, the cause was this day argued by the parties.

Joubert, for the plaintiff, in support of the above judgment, maintained, that it was well-founded in law, because the price to be paid for the wine was a bond, to be granted by the buyer. That the bond never having been given, the price had not been paid. That this could not be deemed to be a sale *on credit*, nor could the delivery of the wines be deemed to have been made on credit. That where the price of an article, not sold and delivered *on credit*, is not paid, the *dominium rei venditæ* remains with the seller, and may be vindicated by him, *at any time, or at least within six weeks*, which last term would apply to the 18 pipes, shipped in the *Nautilus*. Geyer's official letter to the Sequestrator, which had been written within six weeks after the delivery thereof, being a sufficient act of vindication. (*Vide* L. 19, Pand. *de Contrah. empt.*, (18. 1); Bynkershoek, *Quæst Juris. Privati*, b. 3, c. 15; Van der Linden's *Institutes*, b. 1, c. 7, § 2, p. 120, Eng. edit.) And that therefore the seller, in the event of the purchaser's bankruptcy, must have a preference on the proceeds of the wines, on the debtor's estate, at least for the price at which the wines had been sold by him, if not for the full amount of the proceeds of the articles sold.

The Court held that the wine had been sold and delivered on credit, and that, by the delivery, the *dominium* of the wine was completely transferred to, and vested in Wentzel, and Geyer completely divested of every *real* right in or to the wine; consequently, that Geyer was not entitled to any preference upon the proceeds of either parcel of wines, and that the preference originally awarded to the defendant must be confirmed.

The Court therefore reversed the sentence of the late Court, and dismissed the claim made by the Sequestrator against the defendant.

Costs to be paid out of the estate.

4. On the 14th September, 1830, in *re Truter v. Commissioner for the Sequestrator*, Truter, who had, in the above action of Commissioner for the Sequestrator *v. Vos*, acted as attorney for the Commissioner for the Sequestrator, the then plaintiff, now claimed provisional sentence against the then plaintiff, now defendant, for the amount of his taxed bill of costs.

The defendant resisted the claim, on the ground, that the Court had ordered the costs to be paid out of Wentzel's estate; that the funds, on which the above-mentioned judgment had awarded a preference to Vos, and which were in the possession of Vos, when the judgment was given, formed the sole assets of Wentzel's estate, and that Vos, and not the defendant, was now liable to pay the plaintiff, the costs now claimed by him.

Commissioner
for the
Sequestrator
v.
Vos.

The *Court held*, that this was no sufficient defence against the claim, and that the defendant was, in the first instance, liable to the plaintiff, *his* attorney, for *his* costs, whatever claim to relief, the defendant might have against Geyer or Vos, as to which the Court could not now decide; and gave provisional sentence, as prayed, with costs.

WITHAM v. VENABLES.

[14th March, 1828]

Security for Costs when exigible from the Plaintiff.

In this case, the defendant claimed, that, before proceeding, the plaintiff should find security for the costs.

Witham
v.
Venables.

But the *Court*, after full argument and a deliberate consideration of all the authorities, *held*, that the plaintiff was an *incola* of this colony, and that no person, who is either *civis municeps* or *incola* of this colony, can, as plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent; and on the other hand, that every person, who is neither *civis municeps*, *nec incola*, may, as plaintiff, be called on to give security for costs, unless he prove that he is possessed of immoveable property, situated within the colony.

The Court acted on this decision as a precedent, and therefore, refused the application, that the plaintiff should give security for costs, in a subsequent case of *Malan v. Ziedeman*, 29th June, 1829.

The authorities quoted by the defendant were,—Huber, *Jus Hodiernum* (*Hedend. Regtagel.*), b. 5, c. 19, § 2, p. 756; Merula, b. 4, tit. 41, c. 1; Van der Linden's *Instit.*, b. 3, pt. I., c. 2, § 14, p. 412, Eng. edit., and Manier van *Proced.*, p. 49, 50; Cæsar, *Jus Hodiernum*, lib. 4, tit. 11, § 2; the Decisions of the late Court in the cases of *Abercrombie v. Wehr*, 6th April, 1822; *Shee v. Tilly*, 29th April, 1824.

Witham
v.
Venables.

The authorities quoted by the plaintiff, and relied on by the Court, were,—Van der Linden, *Form van Procedeeren*, b. 2, c. 4, § 4; Voet 2, 8, 1, par. "*Sed in judiciis hodie*;" 5, 1, 92, 93, 94, and 50, 1, 2; Brissonius de verb. Sign. voce peregre, Peregrinus; Van Leeuwen, *Roman D. Law*, b. 5, c. 17, § 9, p. 589, Eng. ed.; Van der Linden, as above.

DUNLEVIE v. HARRINGTON & GADNEY.

[18th March, 1828.]

Security for Costs, when exigible from the Plaintiff, a Military.

Dunlevie
v.
Harrington &
Gadney.

De Wet, for the defendants, contended that the plaintiff was bound to give security for costs, notwithstanding the decision in *Witham v. Venables*.

1st. Because he was paymaster of the 98th Regiment, and had no real property in the colony;

2dly. Because the Court would not have authority, to enforce their judgment against the plaintiff, by decree of civil imprisonment (*vide Statutes of India*, art. 4, tit. Arrest);

3dly. Because if the plaintiff were ordered away with his regiment, he could not be arrested as *in fuga*. Voet 2: 4, 39, and L. 23 Pand. *ad Municipalem* (50, 1.)

Joubert, *contra*, quoted Voet 5: 1, 93, 94, 108.

In respect of which last authority, the Court held, that soldiers in service are, *quoad hoc*, in the eye of the law, *incolæ* of the place in which they are serving, and refused the application for security for costs.

KING v. DE VILLIERS.

[18th March, 1828.]

Misnomer, when not fatal in a Criminal Warrant.

King
v.
De Villiers.

Denyssen, in support of a memorial from *Jan Jacobus de Villiers*, praying for his liberation, produced the warrant of his committal, in which he was named only as *Jan de Villiers*, and an affidavit, that his christian names really were *Jan Jacobus de Villiers*, which omission of one of the names, he contended, rendered the warrant informal, and consequently null.

But the Court held, that the warrant was sufficient, and the omission of *Jacobus* immaterial, seeing that in it, the prisoner was correctly and sufficiently described in other respects.

NOURSE v. SIMPSON.

[18th March, 1828.]

Appeal, for what Amount allowable under Section 51 of Charter, 1828 (see new Charter, 1833, § 50).

The Court held, that under the provisions of the 51st section of the 1st Charter, it was not competent for the Court, to allow a case above the value of £500, but under that of £1000, to be appealed, although the decision sought to be appealed from, had been finally given by the former Court, from whose decisions an appeal was allowed in cases of the value of £500.

Nourse
v.
Simpson.

MAASDORP v. MORKEL'S EXECUTOR.

[20th March, 1828.]

What effect of renunciation of "Beneficium Excussionis" by Surety.

In this case, the Court refused the application made by the defendant, that the plaintiff, who had recovered judgment against the defendant, as surety in a bond, in which he had expressly renounced the *beneficium excussionis*, should be restrained from putting this judgment into execution, until he should first have taken in execution, the property of the principal debtor.

Maasdorp
v.
Morkel's
Executor.

The defendant quoted Lybreghts, vol. 2, c. 34, n. 24, p. 283.

The plaintiff quoted Van der Linden's Instit., b. 1, c. 14, § 10, p. 138 (Eng. ed. p. 211.)

HARE, q.q., v. CROESER.

[27th March, 1828.]

1. *Renunciation of "Beneficium Excussionis" by Surety, of what effect.*
2. *Excussion, what sufficient.*

1. In this case, the Court found, that a surety in a bond, who had expressly renounced the *beneficium excussionis*, was, in respect thereof, (independently of the fact of his being bound

Hare, q.q.,
v.
Croeser.

Hare, q.q.,
v.
Croeser.

as *joint principal debtor*), not entitled, to oppose the creditor's demand for payment, on the ground, that by the said bond, real property of the principal debtor, was specially mortgaged, in security of the debt, which had not been excused by the creditor.

The defendant quoted Van Leeuwen, Rom. Dutch Law, b. 4, c. 4, § 7, n. 4, 5.

The authorities relied on by the Court were, Voet 46 : 1, § 14 *in præm.*, § 15 *in fine*, § 16 *in med.* "*Cum.*" and *in fine*.

2. The Court also held, that, even if the creditor had been bound to have excused the property, specially mortgaged in the bond, it had been sufficiently excused (*vide* Voet 46 : 1, § 15 *in med.*, and § 17 *in præm.*), seeing that by the liquidation account of the estate of the principal debtor, of which it formed part, framed by the Sequestrator and confirmed by the final judgment of the late Court, a preference, extending over and completely exhausting the subject of the said special mortgage, had been awarded to another creditor, and that the Sequestrator had certified, that the debtor had no other property to satisfy his debts; that the creditor, in order to complete the excussion, was not bound, to have appealed against this judgment, and *a fortiori*, was not bound to await the decision of an appeal, which had been taken against it by other creditors.

NISBET & DICKSON v. GRIFFIN.

[20th March, 1828.]

1. *Shipping ; Master's right to Wages and Passage-money, when discharged without fault, before proper termination of Voyage.*
2. *Termination of Voyage, when.*

Nisbet &
Dickson
v.
Griffin.

The decision of the Court was given in respect of the following facts:—

The appellants, a firm domiciled in Cape Town, and their correspondents, Messrs. Burnie & Co., of London, were joint owners of the schooner *Studcomb*, of which the respondent, was by the appellants here, engaged as master, in 1821, at the rate of Rds. 150 per month, and in this capacity he made several voyages, from and back to Table Bay, which was, in these voyages, evidently made the home port of the vessel.

In March, 1823, the appellants, without making any especial or new contract, dispatched the respondent, in the *Studcomb*, to England, with a letter of instructions, which, so

far from intimating any intention of selling the vessel there, contained a request, that he would bring out with him a setter dog from Scotland, for one of the appellants; and it was proved by a witness, that after this question had arisen between the parties, one of the appellants admitted, that, when the respondent left this colony with the vessel, it was the intention of the appellants, that he should return with her to this colony, and that it was after his deposition, that they determined to sell the vessel in England. The appellants, on the other hand, referred to their letter to Burnie & Co., dispatched under the respondent's charge, in which they desired the latter to sell the vessel, if that could be done to advantage; but it was admitted that this letter was sealed, and that its contents were not communicated to the respondent.

The vessel arrived in England in May, and discharged her cargo. On the 29th June, Messrs. Burnie & Co. disposed of the vessel, directed the respondent to make up his accounts, which he immediately did, and was thereupon discharged, being paid his wages up to the 29th June.

On the 6th September, 1823, the respondent applied to Messrs. Burnie & Co. for the amount of his passage-money to the Cape, having waited in London till that time, at their request, to see whether they could procure him another command; and thereupon they paid him £47 5s., for which he granted a receipt, containing this clause,—“Which I promise to repay Messrs. Nisbet & Dickson, if not approved by them.”

The respondent then obtained an engagement as mate of a vessel, bound to Table Bay, where he arrived, having received as wages for his service as mate, during the voyage, £15.

On her return, the appellants brought an action against him for repayment of this sum of £47 5s., and of several other sums, which the appellants had advanced, during his absence, to his wife (who with her family resided in Cape Town).

The respondent put in an account between him and the appellants, in which he claimed a balance of Rds. 292.

In deciding this action, the late Court of Justice found the respondent to be entitled, to claim from the appellants Rds. 855, as wages for five months and twenty-one days (being from 29th June till his arrival in Table Bay), at Rds. 150 per month, Rds. 210 for his expenses while on shore in England, and Rds. 681 4 sk. for passage-money from England back to the Cape,—total £129 9s. 9d., but under deduction of the £15, which the respondent had received as wages as mate on his voyage out, and costs.

From this judgment the appellants appealed, for three reasons,—1st. That the respondent being a hired servant at

Nisbet &
Dickson
v.
Griffin.

monthly wages, might be discharged at the expiration of any month, at the option of his employers. 2dly. That the respondent can prove no contract or stipulation, that the vessel should return to the Cape. 3dly. That the respondent, by engaging himself as mate on board of the vessel in which he returned, and by receiving his discharge from Messrs. Burnie, in London, on the 29th June, 1823, has thereby barred his right to any claim upon the appellants, from that date.

1. The *Court held*, that if a mariner be engaged for a certain voyage, although at monthly wages, and be discharged without cause before the proper termination of that voyage, he is entitled to his full wages, calculated up to such termination, under deduction of such sum as he may in the meantime have earned by service in another vessel. (*Vide* Robinet v. Ship *Exeter*, 2 C. Robinson's Reports, p. 261; Laws of the Sea, tit. 4, art. 10 and 21; Abbott, pp. 432, 442, 450, 457; Holt 1 : 2, p. 445.)

2. The *Court further held*, that the respondent having been employed by the appellants, to perform several voyages, as master of the vessel, in all of which, the Cape was made the *return or home port of the vessel*, and that, as no new contract was made between the parties, when the vessel was dispatched to England, in March, 1823, the contract between the parties, must be presumed to have been on that occasion, the same as on the former voyages, and consequently, that he was engaged for the voyage to England and back to Table Bay. That this presumption, if it needed support, was confirmed, both by the appellants' instructions to the respondent, about bringing the dog from Scotland, and by the admission, proved to have been made, by one of the appellants, that their original intention was, that the respondent should return with the vessel here. The *Court therefore held*, that the respondent was entitled to claim Rds. 210 for his expenses on shore in England, but that the respondent, having obtained his passage back to the Cape *gratis*, in a vessel in which he earned wages as mate, was not entitled to any sum, on account of passage money back to the Cape.

On these grounds, they confirmed the judgment of the late Court of Justice, except in so far as it adjudged the appellants to pay Rds. 661 4 sk., as passage-money, to which extent they reversed it.

The Court reserved the question as to costs for further argument, but the case was not afterwards brought under the notice of the Court.

SMUTS v. STACK, VENDUE-MASTER, VAN REENEN AND
KARNSPECK.

[31st March, 1828.]

1. *Delivery necessary to make effectual a Special Mortgage of Moveables.*
2. *The Assignment of a Debt is completed by delivery of the instrument, having an Act of Cession endorsed thereon.*
3. *An Arrest, made by a Creditor of the Cedent, subsequent to the Cession, is ineffectual, to attach a Debt in the hands of the Cedent's Debtor.*

In August, 1826, Van Reenen passed a notarial bond, for Rds. 12,036, in favour of Karnspeck, binding generally his person and property, according to law; and further binding himself, to hold a sale by auction "of his cattle in the country districts, and to make over the vendue-roll arising therefrom unto said Karnspeck, unless this bond be in the meantime paid."

Smuts
v.
Stack, Ven-
due-master,
Van Reenen,
and
Karnspeck.

This bond was duly registered.

On the 2d May, 1827, Van Reenan executed another notarial bond (which was duly registered), for a debt, due by him to the plaintiff, Smuts, whereby he *speciallly* mortgaged to Smuts, *inter alia*, 30 bastard oxen, 80 cows, 100 mares, 300 wethers, and 300 sheep.

No delivery of any of the mortgaged cattle was given to Smuts, the possession thereof being left unchanged in Van Reenen.

On the 16th and 17th, Van Reenen, with the knowledge and consent of the plaintiff, caused the cattle so specially mortgaged to the plaintiff, to be sold by auction, and on the 1st February, 1828, he assigned and delivered the vendue-master's vendue-roll of the proceeds of the sale to Karnspeck, in terms of the stipulation in his bond. Subsequent to the date of this assignation, the plaintiff caused the proceeds of the said cattle, to be duly arrested in the hands of the vendue-master, and now, in virtue of his special mortgage bond, and of the arrest founded thereon, claimed the proceeds of the cattle, and was opposed by Karnspeck, who claimed the proceeds, in respect of the assignation to him, of the vendue-roll in terms of his bond.

1. The Court held, that the special mortgage of cattle, left in possession of the owner, the mortgagor, did not affect the *dominium* of the cattle, which remained entire in the mortgagor, and was not effectual, against a subsequent *bond fide* sale of them to a third party. That in this case, the proceeds of the cattle came in the place of the cattle, and were subject to the same right, which the plaintiff had to or in the cattle, but to no stronger right.

Smuts
v.
Stack, Ven-
due-master,
Van Reenen,
and
Karnspeck.

2. That, by the law of this colony, the cession of a debt is completed by delivery of the deed constituting it, having the cession endorsed thereon, without the necessity of any other form or solemnity, and that the cession of the vendue-roll, is a complete transference to Karnspeck of all right, which Van Reenen had against the vendue-master, and therefore, that the proceeds of the sale, were by the cession as completely transferred to Karnspeck, as the cattle would have been if sold and delivered to him. In which case, the plaintiff could not, in respect of his special mortgage, have made any claim on the cattle in the hands of Karnspeck.

3. That, as the plaintiff's arrest was laid on, subsequent to the cession of the vendue-roll to Karnspeck, it could not, to any extent, compete with, or defeat or impair, the legal effect of the cession. Other grounds had been stated by Karnspeck, in support of his claim, but the judgment of the Court was given solely on the above grounds.

Burton, J., dissented from the judgment of the Court, because he held, that what had taken place, was not a legal and effectual transference to Karnspeck of the vendue-roll, and of Van Reenan's claim under it against the vendue-master.

NISBET & DICKSON v. RICHARDSON.

[1st April, 1828.]

1. *Liquidation Account of Insolvent Estate, unconfirmed, not a Final Sentence.*
2. *Civil Imprisonment; execution stayed in consequence.*

Nisbet &
Dickson
v.
Richardson.

1. A liquidation account of an insolvent estate, showing a deficiency to discharge applicant's debt, not yet confirmed by the Court, although framed in terms of an order of Court, setting aside a former one, was *found* not to be a final sentence, and therefore, not to be a warrant for a decree of civil imprisonment, against the insolvent. (*Vide supra* p. 286. *Sequestrator v. Vos*, 11th March, 1828, and *Sequestrator v. Woutersen*, 1st April, 1828, respecting the effect of the same liquidation account.)

2. The Court ordered that the writ on the decree of civil imprisonment, granted on the 9th March, 1828, at the instance of Twycross, founded on the same liquidation account against the same defendant, (when a similar objection had not been made), should not be issued, without a special application to the Court. (*Vide Villiers v. Le Riche*, 29th March, 1831; *McKenzie v. Cornelis*, 1st August, 1833.)

MAYNARD v. MALAN, WIDOW OF MORKEL.

[2d June, 1828.]

1. *Power of Attorney.—What terms sufficient, to authorise Attorney to execute Special Mortgage Bonds.*
2. *"Anatocismus," Accumulation of Interest,—what effect,—Whether received into Law of Holland,—not pleadable against an onerous "bonâ fide" Assignee.*

The plaintiff in this case claimed provisional sentence on a mortgage bond, bearing to have been executed in his favor, before the Colonial Secretary, by J. M. Horak, as attorney for the defendant, in virtue of a power of attorney, produced to the Secretary, at the execution of the bond.

Maynard
v.
Malan,
Widow of
Morkel.

Denyssen, for the defendant, complained, that the mortgage bond had been passed by Horak for his own private debt, and not for a debt of his principal, and therefore raised two objections against the claim made:

1. That the terms of this power were not sufficient, to entitle Horak to bind his constituent by a bond of this nature, seeing it contained no special power to acknowledge this debt, or to mortgage the property in question, and quoted l. 49, *ff. de procur.* (3. 3); l. 60, § 4, *mandati* (17. 1), and Vinnius Inst., L. 2, tit. 1, § 42.

Cloete, *contra*, referred to the following clauses in the power of attorney:—"With power, &c., &c., generally, to take charge of, and promote, execute, and prosecute, all his, the appearer's, matters, business, and affairs, with all his claims, upon and against all and every one, and for that purpose, everywhere, *and in all circumstances*, his person to represent, &c., &c.; *security to give*, and the sureties indemnification to promise; *over all matters and questions* to accord, transact, and compromise, and thereof to sign and pass such acts, with or without the willing condemnation of all such higher and lower Judges, as may be required,—and if, for the performance of one or other, a more ample or more special power should be required than is comprehended herein, the same the appearer holds as if herein inserted," &c., &c. (it also contained a power to accept or reject inheritances which may devolve to the grantor), and maintained that these powers were sufficient, to authorise Horak to pass the bonds in question, Voet 17: 1, § 9; and maintained that, even if Horak, being clothed with such powers, had granted the bond against the intention of his constituent, it would be valid, in so far as third parties were concerned, leaving to the constituent his remedy by action against his mandatarius.

The Court held, that the power of attorney contained

12th June,
1828.

Maynard
v.
Malan,
Widow of
Morkel.

clauses which, according to their true legal construction, *expressly* gave Horak the power, of executing mortgage bonds over the defendant's property, in security of debts due by the defendant; and that, even if this special power were not expressly given, the general powers given, are so ample as to include a power, of pledging the constituent's property for his debts. (*Vide* ll. 58, 60, 63, *ff. de procur.* (3. 3); Voet 20: 3, § 7; Van Leeuwen, Rom. Dutch Law, b. 4, c. 13, § 4, p. 357, Eng. edit.)

2. In support of the second objection, Denyssen, alleged that the bond sued on was for £330 ls. 6d., being the amount of a debt due previously by private bond, and contained a renunciation of the exception *non causa debiti*.

It was admitted that the bond was given to the creditor therein named, for the amount of two private bonds due to him by J. M. Horak, q.q., and thereupon discharged together with one year's interest, then due on said bonds. Which accumulation of an arrear of interest with capital, Denyssen, for the defendant, maintained, to be *anatocismus*, and therefore unlawful, and quoted l. 28, Cod. *de Usuris* (4. 32); Voet 22: 1, § 20; Van Leeuwen, Cens. For. p. I., L. 4, c. 4, § 27.

He only maintained this objection to the extent, that no interest can legally be demanded on that part of the amount of the bond, which is composed of said arrear of interest.

Cloete, *contra*, maintained, that the transaction in question did not amount to *anatocismus*, and quoted Voet 22: 1, § 20 *in fine*, and the exception of *anatocismus* is not competent against a *bonâ fide* assignee, which the plaintiff in this case was.

Postea (12th June, 1828).—The Court held, that it was unnecessary to inquire, whether the provision of the Roman Law against *anatocismus*, had been received into the Law of Holland (*vide* Van Leeuwen, Rom. Dutch Law, b. 4, c. 7, § 6, p. 341, Eng. ed.); because, even if they had been, *anatocismus*, at the very most, merely barred a demand for interest on what was interest, and did not vitiate or annul the bond accumulating interest with capital, even in a question between the original creditor and debtor; and because *anatocismus* cannot be founded on, or pleaded against, a *bonâ fide* onerous assignee of a bond, which sets forth *in gremio* a legal *causa debiti*.

And granted provisional sentence, with costs.

DENEYS *v.* STOFFBERG.

[5th June, 1828.]

Costs,—when to be paid before proceeding in the same case.

In this case, the plaintiff claimed provisional sentence.

The defendant objected to the plaintiff's right to proceed in this action, in respect, that he had not paid the costs, which he had been condemned to pay to the defendant, of certain legal proceedings, formerly instituted by the plaintiff, for recovery of the same debt.*

The Court repelled the objection, in respect, that the defendant had not procured the taxation of the said costs, nor made any demand for payment of them on the plaintiff.

Deneys
v.
Stoffberg.

IN RE THE WIDOW VAN DE GRAAFF.

[5th June, 1828.]

Supreme Court.—Extraordinary power assumed to supply defects in Law; appointing Magistrate to take examination of Insolvent, which is by Ordinance 46, § 1, required to be taken by the Court or any of the Judges thereof.

The Ordinance No. 46, § 1, enacted, that "it shall be lawful for any person, who is unable to satisfy his creditors, to make affidavit before the Chief Justice, or any of the Judges of the Supreme Court, that he is insolvent, &c., &c., and thereupon, it shall be lawful for the Chief Justice or any Judge of the Supreme Court, to direct such person to be brought before him, and to examine the said person touching the same."

In Re the
Widow
Van de Graaff.

On the application of the widow, supported by affidavit, that she was unable from age and infirmity, to come to Cape Town to make the affidavit, required by the said enactment,

The Court appointed the Resident Magistrate of Stellenbosch, commissioner, to take her affidavit and examination as to her insolvency, the law having made no provision for such a case.

* Cons. Merula, Man. van Proced., Lib. 4, tit. 109, c. 1, n. 2, in nota; Van Leeuwen and Aller, ad. Art. 2, of Ordonn. op Man. van Proced., 1580; Instruction of the Court of Holland (1531), Art. 111.

COOKE v. HOGUE AND WATERS.

[16th June, 1828.]

Special Power of Attorney, to sell Goods and receive Money, gives no power to Attorney to go beyond, nor to defend Suits.

Cooke
v.
Hogue and
Waters.

The summons in this case for payment of two bills, accepted by Hogue, who had left the colony, was directed against Waters, as being the attorney and representative of Hogue.

Joubert, for Waters, produced the power of attorney by Hogue in his favour, which gave him power *only to sell certain goods and to collect outstanding debts*, but contained no power to him to pay, acknowledge, or deny debts, or to defend suits; wherefore he contended that Waters had improperly been made the defendant in this action.

Cloete maintained that, although the powers last mentioned were not specially expressed in the instrument, yet that the powers given in it were sufficient, to give it the effect of a general power of attorney, and consequently, to warrant the action being brought against Waters; and quoted Voet 3: 3, § 7.

The Court, on the grounds stated for the defendant, *dismissed* the action, with costs.

MULLER v. MEYER.

[19th June, 1828.]

Surety (Rear Surety, "Achterborg"), what the effect of renunciation of benefit of excussion, with a clause to pay, if Debtor is unable to pay.

Muller
v.
Meyer.

A, B, C, and D bound themselves as sureties and joint principal debtors, in a bond for f7000, granted by Geyer in favor of the plaintiff, mortgaging a house.

Meyer, the defendant, by a separate bond in which he renounced the *beneficia ordinis et excussionis*, bound himself as *rear surety*, "*achterborg*," for the said A, B, C, and D, "*in order, in case they may be unable to pay the amount of their surety, either partly or wholly, in such case to pay the amount of said surety for them.*"

It was admitted that nothing could be recovered from Geyer, or from the property mortgaged.

It was not proved by the plaintiff, to the satisfaction of the Court, that A, B, C, and D had been duly excussed.

Denyssen, for the plaintiff, maintained that the clause above quoted, had not the effect of destroying or impairing

the legal effect of the renunciation of the benefit of excussion, and that therefore, it was not necessary for the plaintiff to prove the excussion of the sureties.

Muller
v.
Meyer.

Cloete, *contra*, maintained, and so the *Court held*,* that the clause above quoted destroyed the effect of the renunciation of the above benefit of excussion.

Provisional sentence refused.

CHIAPPINI v. GEORGE.

[20th June, 1828.]

Mandatores,—*liable to make good the expenses of the Mandate,—how and in what proportion,—“Singuli in solidum,” or each “pro rata.”*

Thirteen of the creditors of the insolvent estate of Smith & Thomson, appointed the plaintiff, together with A and B, trustees of the said estate, by a deed containing this clause,—“And we do further authorise and empower the said trustees, to pay all law and other expenses whatever, which may be incurred in consequence thereof, and which expenses we do hereby agree to reimburse, and allow them proportionally, according to our several and respective debts.”

Chiappini
v.
George.

The plaintiff became the sole trustee, by reason of the death or failure of A and B, and it was admitted, that his expenditure on account of the trust, amounted to Rds. 4979 3 sk. 2 st. over and above all that he had received, or could recover from the insolvent estate.

The plaintiff and A and B were each creditors of the insolvent.

The defendant had claimed, and was ranked for Rds. 1153 6 sk., but it was alleged, and the Court held it to be proved, that the insolvent estate, had a claim against him for Rds. 743 6 sk., so that the balance really due to him by the estate was only Rds. 410.

It was admitted, that one of the plaintiff's co-trustees, and several of the thirteen creditors who signed the trust-deed, had become insolvent, so that nothing could be recovered from their estates.

Joubert, for the plaintiff, maintained that the creditors who signed the deed were mandantes, and therefore liable *singuli in solidum* (*vide* Voet 17: 1, § 10), and that the words “*proportionally according to our several and respective debts*,” had not the effect of making their liability only *pro rata*.

* Consul. Voet 46: 1, n. 16, *Est tamen*., and n. 38; Holl. Cons. vol. 4, Cons. 83.

Chiappini
v.
George.

Cloete, *contra*, for the defendant, maintained, that each of the creditors who had signed the deed, was liable only for a share of the expenses, in proportion to the amount, which his debt bore to the amount of the debts of the other subscribing creditors, and this, whether at the time those other creditors signed, they were or were not insolvent (Voet 45: 2, § 2); but admitted, that the solvent creditors were now liable proportionally, for the shares of such of the subscribing creditors, as had become insolvent after they signed the deed.

The defendant maintained, and the plaintiff admitted, that the trustees, being themselves creditors, by accepting the trust, became liable for a rateable share of the expenses corresponding to their debts, in the same way as each of the creditors who had subscribed the deed.

The plaintiff in estimating the amount of his claim against the defendant, made a deduction, corresponding to the amount of the debt due by the estate to Piton, a creditor, for whom he was agent, but who had not signed or consented to the deed.

The *Court found* that the deed bound only the creditors who had signed it, and each only for such share of the expenses, as corresponded to the amount of his own debt, and that the solvent creditors were not liable, to make good the shares of any of the other subscribing creditors, who were insolvent when they signed, or had become so afterwards.

That the defendant's debt must be estimated at Rds. 410, the balance really due to him, and not at the sum, for which he had claimed, without allowing a deduction for the counter-claim the estate had against him.

That the trustees, although creditors, were not liable, by reason of their acceptance of the trust, for any share of the expenses in proportion to their debts.

And on those principles they would have given judgment, but for the admissions which both the plaintiff and the defendant had chosen to make, as to their liabilities, to which the Court gave effect, in estimating the amount, for which they gave judgment against the defendant.

NISBET & DICKSON v. VENABLES.

[23d June, 1828.]

Attorney—capacity of, what proof not sufficient.—Exception of Non-qualification pleaded.

Nisbet &
Dickson
v.
Venables.

The plaintiffs in this case, sued in the capacity of attorneys of Hunter and Walmsley, who were alleged to be the assignees under the commission of bankruptcy, alleged to have been

issued in England against G. and R. Farr, to whom the defendant was indebted in the debt sued for.

Brand, for the defendant, pleaded *non-qualification* of the plaintiffs, in respect that the only evidence produced by them to prove their appointment as assignees, were their own affidavits, and that of one of the bankrupts; which he maintained were not sufficient legal evidence to prove their appointment.

The Court sustained the objection, and dismissed the action, with costs.

Nisbet &
Dickson
v.
Venables.

VAN OOSTERZEE v. McRAE, q.q. CARFRAE & CO.

[26th June, 1828.]

1. *Sureties—right of Action against them, can only arise upon the Obligation as entered into by them.*
2. *Are discharged, by Creditor giving up the Security under which they become Sureties.*

Loudon, by a bond, dated 20th March, 1820, became bound to pay Widow Thalman 6000 Spanish dollars *in kind*, and in security thereof, pledged certain promissory notes amounting to Rds. 15,540, and bound himself to pass a mortgage bond for 25,000 guilders over a certain house; on doing which, two of the promissory notes for Rds. 2455, were to be restored to him, and as the pledged notes became due, he bound himself to provide other and good securities, in lieu of those notes which should become due.

Van Oosterzee
v.
McRae, q.q.,
Carfrae & Co.

J. Carfrae & Co., the defendants, “declared to interpose themselves *in solidum*, as sureties and joint principal debtors, for the before written sum with the interest.”

On the 11th August, 1820, Loudon mortgaged the house aforesaid, in further security of his debt of 6000 Spanish dollars, and received back the two promissory notes for Rds. 2455.

On the 8th June, 1821, Loudon passed another bond, mortgaging in further security for the before mentioned debt, three slaves.

The widow died.

Her estate was placed under the administration of the Orphan Chamber.

On the 25th April, 1825, Loudon executed in favour of the Orphan Masters a mortgage bond, in which, after narrating the bonds of the 20th May, 1820, 11th August, 1820, and 8th June, 1821,—that the interest up to the 19th May, 1824, had been paid to the deceased,—that he had, with the

Oosterzee
v.
McRae, qq.,
Carfrae & Co.

knowledge and consent of the deceased widow, disposed of the said promissory notes, to the amount of Rds. 15,540,—that he had now agreed with the Orphan Chamber, to refund the aforesaid sum of 6000 Spanish dollars with interest, not *in kind*, but in colonial currency, at the rate of Rds. 2 6 sk. 1 st., and then to discharge the arrears of interest up to this date, and to pay in part of the capital, the value of 2000 Spanish dollars, at the above rate,—and that he had now complied with the above agreement, he therefore now acknowledged himself to be indebted to the estate of the deceased, the balance of the aforesaid bond remaining due, being Rds. 11,083 and 16 st.

Loudon further expressly “agreed and declared, that the passing of this deed shall never be considered as, or construed into a renovation of the original debt, and in consequence, that these transactions shall in no way prejudice, either the origin of the debt, or the date of its special mortgage.”

The bond further declared, that the mortgage of the slaves, was annulled.

The plaintiff, married the heiress of the widow, and the bond last-mentioned, was in consequence assigned to him, by the Orphan Chamber.

The estate of Loudon, became insolvent.

The plaintiff claimed on it.

Neither the proceeds of the house mortgaged, nor the rest of the estate, were sufficient to satisfy his debt.

The plaintiff therefore claimed, that the defendants, as sureties, should be found liable for the balance.

Denyssen maintained, that the summons, founded only on the bond of the 20th May, 1820,—that there is no transfer of this bond, in favour of the plaintiff,—that his only title, to the debt in question, is an assignation by the Orphan Chamber, in his favour, of the bond, of the 25th April, 1825, executed by Loudon, in favour of the Orphan Chamber, and which assignation, is subjoined, to the last-mentioned bond.

2dly. He maintained, that the original creditor, having given up, to the original debtor, the security of the promissory notes, to the amount of Rds. 13,084, had thereby released the sureties. (Voet 46 : 1. 15 and 38.)

3dly. That the last bond, was a complete novation, of the former debt, and consequently, that the sureties to the former, were not bound, in security of the latter. (Voet 46 : 2. 3.)

4thly. He objected, that the defendants only engaged to pay *Spanish dollars* in specie, whereas the claim here, is made for rix-dollars, the balance being calculated, taking the Spanish dollar, at a higher value, than it is now worth.

Joubert, in reply, maintained, that the house, was worth more than Rds. 2455, having sold, in the worst times, for Rds. 8000 and upwards, after paying all expenses.

2dly. That the clause, stipulating for other good security, on the promissory notes becoming due, only stipulated for security, *to the satisfaction of the creditor*. Van Oosterzee
v.
McRae, qq.,
Carfrae & Co.

3dly. That the stipulation, in the original bond, being only, that the house should be mortgaged, for 25,000 guilders, (equal to Rds. 8333,) and the house being worth much more, and having been mortgaged, for the whole debt, must be considered, as having been *the good security*, which the creditor took, on giving up the bills.

4thly. That the mortgage of the slaves, must be viewed in the same light, consequently, that there was no foundation, for the defendant's second proposition.

5thly. He maintained, that there was here no novation, and quoted Voet 46 : 2. 7, *lex ult. Cod. de Novat.* (8. 42.)

6thly. He stated, that if the defendants were found liable, the plaintiff had no objection, to receive the balance, in Spanish dollars.

Denyssen rejoined, and argued, that the mortgage, being expressly declared, to be in *farther* security of the debt, and not *in lieu* of any of the existing securities, there was therefore no ground, for the plaintiff's argument on this point ;— and the plaintiff could not found on the bond, mortgaging the slaves, seeing that the Orphan Chamber had discharged it.

The *Court* unanimously, *refused* provisional sentence with costs, holding, that the bond of 25th April, 1825, gave no right of action, against the sureties in the original bond, and that they were not bound at all, by any of the obligations, in the bond of 1825.

2. That the assignation, carried nothing, but the last-mentioned bond, consequently, that the plaintiff had no title, at present, in him, which gave him a right of action, against the sureties.

3. That even, if he had been vested with all the bonds, the sureties were discharged, by the creditor, having given up the security of the promissory notes, without having taken any other and good and sufficient security, and consequently, that it was unnecessary, to decide, whether the original debt, had not been innovated, by the bond of April, 1825, notwithstanding the clause above quoted, which it contained, at least in so far as the sureties were concerned.

BUCHENRODER *v.* THE ORPHAN CHAMBER.

[27th June, 1828.]

Compensation,—not allowable, to Orphan Chamber, as representing one Estate, against a Creditor claiming in another Estate, also administered by Orphan Chamber.

Buchenroder
v.
The Orphan
Chamber.

Buchenroder, sued the Orphan Chamber, for a debt, due to him by the deceased Theron, whose estate was now under the administration of the Chamber.

The *Court decided*, that the Orphan Chamber, could not plead compensation against this claim, on debts due by Buchenroder, to two other and different estates, which were also under their administration, and this, notwithstanding, that it was urged, that the practice of the Orphan Chamber, was to compensate debts, in this manner.

DREYER *v.* SMUTS.

[30th June, 1828.]

Surety binding himself for the payment of the Capital Sum, not liable for the Interest.

Dreyer
v.
Smuts.

The plaintiff claimed provisional sentence, both for the principal and interest, due on a bond, in which the defendant was surety, in which the principal debtor, acknowledged himself to be indebted, in a sum of *f*3000, and promised and agreed, to pay interest on the same, and in which the defendant “declares, to interpose himself as surety for, and joint principal debtor, *in the above mentioned capital sum of f*3000.”

The defendant objected, that he was not liable for the interest, and quoted Voet 46: 1. 12 and 13; 1. 99, *ff. de Verb. Oblig.* (46. 1.) and 1. 68, *ff. de Fidej.* (46. 1.)

The *Court sustained the objection*, and gave provisional sentence, only, for the capital, with costs.

HEEGERS *v.* KARNSPECK.

[20th, 21st, 22d Aug., 1828.]

1. *Affidavit of Party,—not admissible as Evidence for him in the cause.*
2. *Witness,—A manumitted Slave, admissible as a Witness against his former Master.*

3. *Stamp*.—*Whether a Bond, not having a proper Stamp, is thereby null and void, or may still be covered with a proper Stamp, under Proclamation of 24th December, 1807, and 30th April, 1824.*

In this case in appeal, the following three points were raised:—

Heegers
v.
Karnspeck.

1. In arguing the appellant's case, De Wet, founded on an affidavit of the appellant, as evidence in his favour, on the grounds, first, that leave to file this affidavit, and certain other documents annexed to it, had been prayed, in a memorial to the late Court of Appeals, and had been received by that Court, and taken into their consideration, when they pronounced, a certain interlocutory sentence in the cause. Secondly, That by the law of this colony, it is competent in some cases, to receive a party's oath, in his own favour. (Van Leeuwen, Rom. Dutch Law, b. 5, c. 22, § 4, p. 619; Voet 22: 3, § 3.) That for *this* Court, *now* to refuse, to admit the affidavit, would have the effect, of an *ex post facto* law.

Joubert, *contra*, maintained, that in the late Court of Justice, it was not held, that the admission of a document, into the proceedings, was equivalent, to its being considered, competent and legal evidence; that the practice was, to allow the parties, to file any documents, they thought fit, and it was only, when the case came to be decided, that any judgment, was given by the Court, as to the competency, of receiving as evidence, the documents which had been filed; that the memorial, did not pray, that the documents annexed to it, should be sustained as evidence, and therefore, that, granting the prayer of the memorial, could not be construed, as a judicial decision, that those documents were competent and legal evidence.

He pointed out the difference, between the oaths of the parties, *allowed* in supplement, and their voluntary affidavits. (*Vide* l. 10 ff. *de Testibus* (22. 5); Van Leeuwen, Rom. Dutch Law, b. 5, c. 22; Van der Linden's Handboek, b. 1, c. 17, § 3, p. 260, Eng. ed.)

He further stated, that the law of the colony, never allowed a party, to give evidence by affidavit in his own case, and that the practice, of putting in affidavits, had been, at a recent period, introduced by some persons, who were under a mistaken belief, that such was the practice in England.

The Court decided, that the affidavit was inadmissible, as evidence, by the law of this colony; that this law, had not been altered, by any established practice, to the contrary; and that the Court of Appeals, had not given any decision, sustaining this affidavit as evidence.

2. De Wet, for the appellant, also objected, to the admissibility, of one Fritz, as a witness, against the appellant, on

Heegers
v.
Karnspeck.

the ground, that he had been the slave of the appellant, by whom, having purchased his freedom, he had been manumitted, and quoted l. 6, Cod. *de Quaest.* (9. 41), and l. 12, Cod. *de Testibus* (4. 20.)

The Court, without calling on the respondent, *decided*, that Fritz was a competent witness; that the laws quoted, applied only, to that class of persons, who in the Roman Law, possessed the *status* of *libertus*, and that in the law of this colony, no such *status*, as that of *libertus*, was recognised, all persons, being by it, classed, either as free, or as slaves; that Fritz, being since his manumission, *free*, was, as a witness, in the same situation, as any other free person.

3. De Wet, further maintained, that the bonds, which he had been condemned to pay, by the judgment, now under appeal, were null, in respect, they were only covered, by stamps of 24 stivers, instead of by stamps of Rds. 10, contrary to the provisions of the Proclamations, of the 24th December 1807 and 30th April, 1824.

Joubert, for the respondent, maintained, that the bonds, might now be covered, with stamps of the value, required for bonds of that amount.

And so the Court *decided*.

The Chief Justice, Menzies, J., and Burton, J., held, that the Proclamation of the 30th April, 1824, had the effect of enacting, that all the stamp duties, contained in the schedules in that Proclamation, should be enforced, in the same way, that the duties established by the Proclamation of 24th December, 1807, were by it directed to be enforced. That by this last-mentioned Proclamation, it was enacted, that every deed, should be null and void, which should thereafter, not be drawn out upon, *or covered* with the stamp, therein prescribed. That whatever may have been the intention of the legislature, yet as no time was specified, within which a deed, not drawn out upon a proper stamp, *might be covered with the proper stamp*; this might be done at any time, and therefore, the clause must be construed, as if it had expressed, "that deeds, not drawn out upon proper stamps, should be null and void, *until they should be covered, with proper stamps*."

Menzies, J., and Burton, J., (and it was understood the Chief Justice,) doubted, whether the penalty of nullity, was intended, to apply to any failure, to use the proper stamps, *except* in the case of such deeds, as it was intended, should have stamps, at the time of their execution, without reference, to whether they might, or might not, be produced in judgment, and not to the failure, to use stamps, which were only directed, to be used in the Court of Justice, in respect of certain documents, upon their being produced in evidence in Court; that is to say, that it was not intended, to enact, that

deeds, previously valid without stamps, should become null and void, to all intents and purposes, merely, because when lodged in process, they were not covered with the proper stamps, prescribed to be used, in respect of documents, produced in process.

Heegers
v.
Karnspeck.

It was for the Court, when any document was so produced, without the proper stamp, to reject it, *until* it should be covered, with the proper process stamp.

Kekewich, J., thought, there was great difficulty in the case, but that, as the evils, which would result, from declaring bonds, in such cases, to be null and void, were much greater, than *any*, that could result from a contrary construction, he was of opinion, that the objection of nullity, should be repelled.

Menzies, J., and Burton, J., expressed an opinion, that even, if the objection,—that no effect could be given, to the bonds as evidence, in respect, that when lodged in process, they had not been covered with the proper process stamp,—were well founded in law, yet, that it could not avail the appellant, in the present case, because in the Court below, the appellant had admitted, on the record, enough, as to the existence and contents of the bonds, as to render the production of the bonds themselves, to prove their contents, unnecessary, and because, as in the appeal process, the appellant himself, had lodged copies of the bonds in question, the production of the bonds themselves, was unnecessary, the Court having enough in the process, as it had come to it from the late Court of Appeals, to enable it, to decide the question before the Court.

BEYERS v. LIESCHING.

[2d September, 1828.]

*Rules of Court 19 and 27 (1828) in how far under it, a party is foreclosed from producing a Document not filed or annexed to the Pleadings.**

In this case, Bergh, for the defendant, tendered in evidence, a paper, which he had proved, was written by the plaintiff, for the purpose of showing, that the expression, which the plaintiff had proved, to have been used, by one of the defendants, "Beyers you must make out your *account*," applied to a different *account*, from that, to which the plaintiff sought to have it applied.

Beyers
v.
Liesching.

* The Rule 19 (1828) which directs, that "Copies of all the documents of which the defendant will avail himself on the hearing or trial," and also Rule 18 requiring the same from the plaintiff, have since been amended in that respect, 2d March, 1829; Rule 27 of 1828, has also since been amended, 2d March, 1829.

Beyers
v.
Liesching.

De Wet objected, to the production of the paper, because a copy of it had not been filed, in terms of the 19th or 27th Rules of Court.

The *Court* allowed the paper, to be produced, holding, that those Rules, did not apply, seeing, that the paper, was neither relevant, nor was it produced, for the purpose, of directly supporting the defence, or rebutting the claim, but was produced, merely incidentally, to obviate the effect, of a circumstance of evidence, which had come out, in the course of the trial, and which the defendant, could not previously have known, would be attempted to be proved, by the plaintiff.

LEY v. ECKHARDT.

[12th Sept., 1828.]

1. *Civil Imprisonment, granted in respect of a Sentence of the late Court of Petty Cases.*
2. *Jurisdiction of Court of Justice for Civil Imprisonment.*
3. *Court of Justice,—Power to confer this Jurisdiction on Court of Petty Cases, by the abolition of which Court, that Jurisdiction returned to Court of Justice.*
- 4 & 5. *Charter, Section 56 (1828) transferred that Jurisdiction to Supreme Court, not taken away by Ordinance No. 44, § 14.*

Ley
v.
Eckhardt.

De Wet, moved for decree, of civil imprisonment, against the defendant, in respect of a sentence, of 21st January, 1826, given by the late Court of Commissioners, for the trial of Petty Cases, in Cape Town, and a declaration, made by the defendant, on oath, to the Sequestrator, that he possessed no property, and referred to the publication, by the late Court of Justice, of 3d April, 1823, and to § 128, 129, of the Instructions to Landdrosts, &c., of the Country Districts.

1. The *Court* granted decree, of civil imprisonment. The Court being of opinion:—

2. That the late Court of Justice, originally possessed, the sole jurisdiction, of enforcing the decrees, of the above mentioned Courts, by civil imprisonment.

3. That the Court was empowered by this jurisdiction, to confer, and did confer, on the Petty Courts themselves, but by the abolition of the Petty Courts, that jurisdiction, returned to the late Court of Justice.

4. That it was transferred from that Court, by the Charter, § 56, to the Supreme Court; and

5. That the Ordinance No. 44, § 14, neither was intended to have, or could have, the effect, of taking away this jurisdiction from the Supreme Court.

MUTER v. SATCHWELL.

[4th September, 1828.]

1. *Civil Imprisonment on a Sentence of Resident Magistrate refused.*
2. *Ordinances No. 33 and 44 gave Magistrates no Jurisdiction to pass Sentence, on which Civil Imprisonment can be enforced.*

1. Hofmeyr, claimed decree of civil imprisonment, in respect of a sentence, of the Resident Magistrate for Cape Town, and a return of *nulla bonâ* by the messenger, on the writ of execution thereof; and in support of the application, quoted Merula, Man. van Proced., L. 2, tit. 7, c. 2, not. 2; the Publication of the late Court of Justice, 3d April, 1823, §§ 2, 4, 9; Voet, L. 42, 1, 40; Van der Linden, Judic. Praktyk, 1, 5, 25; Merula, b. 4, tit. 2, c. 23, note *a*.

Muter
v.
Satchwell.

2. The Court *refused*, to grant the decree, on these grounds: That the Ordinances Nos. 33 and 44, establishing the Courts of the Resident Magistrates, taken in connection with the rules, duly established for those Courts, neither gave, nor were intended to give, a jurisdiction, which should enable these Courts, in civil cases, to do any thing, which could affect the personal liberty of the parties. That the sentence of these Courts, could therefore, *per se*, give the plaintiff *no right*, to have the defendant imprisoned, for non-fulfilment of that sentence, and that as the only ground, on which the plaintiff could legally apply to this Court, for a decree of civil imprisonment, in respect of such a sentence, was the existence of a right in him, to have his debtor imprisoned, in virtue of that sentence, which right, it has been shown, the sentence did not give him; his application was groundless, and must be dismissed.

Were the Court, now to give decree for civil imprisonment, on this sentence, into the merits of which, the Court have at present, in the shape in which the case is before them, no power of enquiring, the effect of this proceeding would be, to enable the Resident Magistrate, to do *per ambages*, what he could not do directly. It would be in fact, to give the Resident Magistrates a jurisdiction, to pronounce sentences in civil cases, having the effect, of causing the defendant, in default of performance of them, to be imprisoned, an extent of jurisdiction, which the colonial legislature, intended those Magistrates should not possess.

The Court, gave the same decision, on the same grounds, in the case of *De Villiers v. Cruywagen*, 13th March, 1832.

LANGEVELD *v.* TYRHOLM.

[4th September, 1828.]

*Civil Imprisonment; return of "nulla bona" sufficient proof of no Property.*Langeveld
v.
Tyrholm.

The Court decided, that a decree of civil imprisonment, may be granted, against a debtor, without any other evidence, that he possesses no moveable property, than the return of *nulla bona*, by the Sheriff on the writ of execution; and that, if the debtor avers, *he must prove* that he does possess such property.

VENABLES *v.* JARVIS.

[5th September, 1828.]

*Contract,—engagement as a Clerk, whether by the year or by the month.*Venables
v.
Jarvis.

In this case, the question arose, whether the defendant, who had been employed by the plaintiff, as a merchant's clerk, during the years 1824, 1825 and 1826, and who had been dismissed in October, 1827, had been hired by the year, and was therefore entitled to salary, to the end of 1827, or only by the month, and so entitled to salary, only to the end of October.

There was no proof of a contract, for any term certain.

The plaintiff's books, were kept by the defendant, and on the 31st of December, in each of the years 1824 and 1825, he credited himself in the books, with a total sum of Rds. 1440, as his salary for twelve months, at Rds. 120 per month. The corresponding entry in the books, under the date of 31st December, 1826, was blank, both as to the sum total, and as to the rate *per* month. (He alleged, he had been promised, an increase of salary, for that year). Although the entries in the books, thus computed the sum total, for each year, at the end of the year, but at so much a month, and by the number of months, the salary had been paid, neither monthly, nor in the lump, at the end of the year, it being proved, by an account-current, between the parties, that the defendant received, both money and goods, on account of his salary, at irregular intervals.

The Chief Justice, Menzies, J., and Kekewich, J., were of opinion, that, as there was no express contract for a year proved, nor any custom or practice or circumstance proved, from which an agreement for a year could be inferred, and as

the only circumstance in the case, from which any inference could be drawn, as to any term of service, was the fact, of the amount of the salary, having been calculated at so much a month, *for twelve months*, the engagement must be held, to have been from month to month, and therefore, that the defendant was entitled to salary, only to the end of the month, in the course of which he was dismissed.

The Court gave judgment accordingly.

Burton, J., although he had great doubts, as to what was the term, agreed on between the parties, was rather of opinion, that the Court ought to have found, that the agreement was for a year.

Venables
v.
Jarvis.

VENNING, q.q., v. VENABLES.

[6th September, 1828.]

1. *Witness,—receiving Commission on a Debt recovered, inadmissible as a Witness, for the recovery of that Debt, but becomes admissible by a release of that Commission.*
2. *Bill of Exchange,—notice of Non-acceptance necessary.*

This was a case on a bill of exchange, in which laches on the part of the holder, were set up in defence.

1. De Wet, for the plaintiff, proposed, to call Venning, the nominal plaintiff, as a witness.

Joubert, for the defendant, objected, that Venning was *nullus idoneus testis in re sua*.

De Wet answered, that Venning was a mere nominal plaintiff, and had no interest whatever, in the result of the cause, not even as to costs, because by the law of this colony, no person, suing merely as attorney for another, is liable personally for costs. (*Vide* Van der Linden's Inst., b. 1, c. 17, § 3; Voet 22: 5, §§ 6, 7, 12, 19, and 49: 4; l. 10, ff. l. 10, Cod. de Testibus; l. 1, § 11, ff. Quando Appel. (49. 4).)

The Court held, that the mere fact, of Venning being the nominal plaintiff, was not *per se* sufficient, to disqualify him as a witness, and that he might be examined, on the *avoir dire*, as to the fact, of his having any interest in the cause.

Being examined, Venning stated, "If I recover this debt, I shall charge commission on the amount, if I do not, I shall charge nothing."

The Court held, that this commission, was such an interest, as made Venning in this cause, *procurator in rem suam*, and made the cause *res sua*, *vel causa propria*, and therefore, that by the civil law, he was not admissible as a witness; but

Venning, qq.,
v.
Venables.

Venning, qq.,
v.
Venables. before the Court decided, whether by the Law of Holland, this objection affected his admissibility, or merely his credibility, Venning executed a release of his commission, and was therefore admitted as a witness.

2. On the principal question, the *Court absolved* the defendant, from the instance with costs, because the plaintiff, the holder of the bill of exchange sued on, failed to prove, either, that notice had been given to the defendant, the drawer, by the original payee, or any subsequent holder of the bill, of its non-acceptance by the drawee,—or, that the drawee, had no funds of the drawer in his hands; although it was proved, that information had been given, to the drawer, by a third party, having no interest in the bill, that the drawee, had refused acceptance. *Vide* Chitty on Bills, p. 205. (Consul. Ebdon v. Liesching, 15th January, 1829, and 1st January 1830; and Thomson & Watson v. Archer, 1st December, 1829, p. 61 and *post.*)

SERRURIER v. LANGEVELD.

[11th Sept., 7th Oct., 1828.]

Surety, under renunciation of the "Beneficia," and special Hypothec, not entitled to claim previous Excussion of the Hypothec; this privilege belonging only to "simple" Sureties; but may in Execution point out Goods of Debtor.

Serrurier
v.
Langeveld.

The plaintiff claimed provisional sentence, on a bond for Rds. 2200, granted in his favour, by C. J. Langeveld, who, in security thereof, mortgaged two slaves, in which the defendant had bound himself, as surety and joint principal debtor, under the *express renunciation*, of the *beneficia ordinis et excussionis*.

The defendant quoted Grotius Inleid., l. 3, pars. 3, § 32, n. 63; Van Leeuwen, Cens. For., pt. I, l. 4, c. 11, § 12; Placaat 21st February, 1564; and Karnspeck v. Rutgers, decided by the late Court, 10th January, 1822; and maintained, that no action lay, against the defendant, a surety, even although he had renounced the *beneficia excussionis*, until the special mortgage (the slaves), shall first have been excussed, and that, in respect of the above authorities, the decision, in the case of Hare, q.q., v. Croeser, *supra* p. 293, was erroneous.

The Court, in respect that these authorities, last above quoted, had not been brought under their notice, in Hare, q.q., v. Croeser, took time to consider of their judgment.

Van Leeuwen, Cens. For., pt. I., l. 4, c. 11, § 12, states: "*Sed apud nos, etiam non obstante eo, quod fidejussores ordinis et excussionis beneficio renuntiaverint, creditor prius hypothecam excutere tenetur.*" Placaat 21st February, 1564: "*Quod fidejussores, ex causa debiti, pro quo pignus constitutum est, omissa specialis hypothecæ persecutione, convenire indistincte, etiam alio possidente, vetat.*"

Serrurier
v.
Langeveld.

The Placaat 21st February, 1564, ordains:—"That any surety, who may have bound himself, for any debt of a third person, if for the said debt, a pledge or hypothec shall be passed, shall not be sued, before the said pledge or hypothec, shall be excussed, and shall be found not to be sufficient, and then only for the amount of the deficiency; and this, notwithstanding the subject of such pledge, or hypothec, may have come, into the hands of a third person, by virtue of a title."

The Court were of opinion, that this Placaat, provides only, for the use of the sureties, who have bound themselves as such, *simply*, and without renunciation, of the *beneficia ordinis et excussionis*, and is not to be construed, as making such excussion necessary, *where it has been EXPRESSLY renounced*; and this opinion was founded on the authority of Voet 20: 4, 3, *Imo si prædiis*, &c.; 44: 1, 8; 46: 1, 16 and 28; Grotius Inleid., 3: 3, 32, n. 63; Van Leeuwen, Cens. For., pt. I., l. 4, c. 17, § 21; (Voet 46: 1, 15 is not in point) and on the case in Loenius, Casus 30, p. 224, decided 22d October, 1623, in which the defendant quoted the Placaat, 21st February, 1564, and pleaded, that in respect thereof, he as surety, was not liable to be summoned, until the hypothec was first excussed; and the plaintiff replied, that the Placaat, was annulled, by article 36 of the Polit. Ordin. of Holland; the Court found, that the said Placaat was speaking only, of *simple sureties*, where the debtor had also given a hypothec for the debt.

Boel in his notes in this case, states, that by this decision, it was not declared, that the Placaat, was repealed, by the said 36th art. of the Polit. Ordinance, which does not repeal it, but leaves it in its full strength, "so that, it still remains in force, only with this difference, and this construction, that the said Placaat, *only refers to sureties in general*, and does not mention anything, of sureties under proper renunciation, and who have bound themselves as principal debtors;" that therefore the defendant, in the case Hare, q.q., v. Croeser, on having renounced the benefits, to which as surety, he would otherwise have been entitled, was properly condemned. (*Vide*, as to the right of the surety, who has had judgment given against him, when execution is taken out against him,

Serrurier
v.
Langeveld.

to point out property of the principal debtor, and insist on its being taken in execution, Van Leeuwen, Cens. For., pars. II., l. 1, c. 33, § 27; Voet 42 : 1, 32.)*

On these grounds, the *Court repelled* the defence, set up by the defendant, and gave provisional sentence, against him, with costs.

And on the principles, on which this judgment was given, they also gave provisional sentences in the cases of Chase v. Cloete, 30th September, 1821, and Brink v. Anosi, in which similar defences had been made, and the decision of which, had been postponed, until the present case, should be decided.

N.B.—Menzies, J., who was absent on Circuit, when this judgment was given, entirely concurred in it.

IN RE INSOLVENT ESTATE OF BUISSINNE.

VAN DER BYL AND MEYER v. SEQUESTRATOR AND ATTORNEY-GENERAL.

[23d September, 1828.]

1. *Legal Hypothec*—enjoyed by the Government of this Colony, upon the Property of Collectors of the Revenue.
2. *Not diminished or impaired*, by Government taking Sureties from such Collectors.
3. *Kusting Brieven*—and also *Special Conventional Mortgages*, for Purchase Money, or Money lent for payment of Purchase Money, or Mortgage taken over when constituted "*simul et semel*" at the time of the Transfer of the Property Mortgaged, are privileged, and preferent to Prior Tacit or Legal Hypothecs.
4. *Costs*—Government liable to pay Costs of a Suit.

In Re Insol-
vent estate of
Buissonne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

The following were the facts of this case :

A society of gentlemen, called "De Vriendschap," acquired a house, situated in Keizersgracht, Cape Town. Over this house, the society granted three several mortgages, in favour of the Lombard Bank, the Orphan Chamber, and the widow Clarisse. In the years 1814, 15, and 16, the society borrowed several sums, from the appellants Van der Byl and Meyer, in security of which, they granted them, four private bonds.

* Vide case in point Decision of Court in Holland, 8th April, 1661, cited by Van den Berg, Nederl. Advis Boek, Cons. 31, vol. 1, p. 55, *et consul. Novus Codex Batavicus vocē "Borgen;"* Van der Keessel, Thes. 507.

Each of these bonds, contains the following clause: "For the due performance whereof, we hereby bind our persons and property, as likewise all the moveable and immoveable property, belonging to the society 'De Vriendschap' aforesaid, submitting them all, to constraint and execution, as the law directs." The society, also borrowed, about the same time, two different sums, from Van Reenen and Groenewald, the respondents in another now conjoined appeal case, in security of which, they granted to them bonds, of a similar nature. In none of these six bonds, was any special hypothec, or mortgage over the said house, created, in favour of the creditors. And it was admitted, that they had not even the effect, of *general conventional hypothecs*, over the property of the society.

In Re Insol-
vent estate of
Buissonne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

Buissonne had been appointed receiver of the land revenue, on the 31st March, 1820. In the year 1822, Buissonne purchased the house, belonging to the society, for a sum of £133,000. It is alleged, that, in the agreement for this purchase, which, however, has not been produced, it was stipulated, that, instead of paying the whole of the price in money, Buissonne should take over the debts, due by the society, to the Lombard Bank, to the Orphan Chamber, to the widow Clarisse, to the appellants, and to Van Reenen and Groenewald, and should, in security of these debts, grant special mortgages over the house. On the 6th September, 1822, the house was regularly transferred, by the society, to Buissonne; and upon the same day, he executed, in due form, special mortgages over the house, in favour of the Lombard Bank, the Orphan Chamber, and the widow Clarisse, and also, in favour of the appellants, and of Van Reenen and Groenewald. In the bonds, in favour of the three first, the *causa debiti* is stated, to be "a debt *taken over* by him, the appearer (Buissonne), and for which the property herein undermentioned, (the house purchased by him from the society,) was mortgaged." In the bonds, in favour of the appellants, and Van Reenen and Groenewald, the *causa debiti* was stated to be, "a debt against the society 'De Vriendschap,' *taken over by him*, the appearer (*i.e.* Buissonne)," or "a debt *taken over* by the appearer, and which *formerly ran against* the society 'De Vriendschap.'" On the deed of transfer, there is a memorandum, made in the usual form, of the *same* date, stating, that the house was mortgaged, on *that* day, in favour of the Lombard Bank, the Orphan Chamber, the widow Clarisse, and Van der Byl, Van Reenen, Groenewald and Meyer.

In October, 1823, it was discovered, that Buissonne was a defaulter to Government, in a very large sum, which had come into his hands, in his capacity of receiver of the land revenue;

In Re Insol-
vent estate of
Buissonne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

and his estate, appearing to be insolvent, was surrendered to the Sequestrator in October 1823. The house in question was sold by the Sequestrator, for a sum of £136,000, being more than sufficient to satisfy the special mortgages upon it. A scheme of distribution, was framed by the Sequestrator, on the 31st May, 1824, in which a preference was given, on the price of the house, to the creditors, holding the aforesaid special mortgages, and they are ranked in the order, in which their debts are noted on the deed of transfer. This scheme, having been submitted to the Court of Justice, for its sanction, the fiscal, on the part of Government, presented a memorial to the Court, praying, that Government should have a preference, on the price of the house, for the sum of Rds. 20,691, being the amount of the balance, remaining due to Government by Buissonne, as receiver of the land revenue. On the 16th August, 1824, the Court passed a resolution, declaring :

“1st. That the Government has a tacit or legal mortgage, on that estate ;

“2dly. That that right of mortgage, commences, with the appointment of P. S. Buissonne, as receiver ;

“3dly. That that tacit or legal mortgage, has the same force, as a *special* mortgage, in such wise, that it has preference, before all *later* special mortgages ;

“4thly. That the right of mortgage, which the creditors, (viz., the Lombard Bank, the Orphan Chamber, and the widow Clarisse,) have had upon the fixed property, of which Buissonne, by purchase, has become proprietor, and which, by their consent, has been transferred to him,—has not thereby, that is by the change of debtor, been, in any the smallest degree, diminished in its effect (or value), but that that prior hypothecation, with all the right connected therewith, must be considered, to have remained unshaken, and thus to have passed over, upon the next purchaser, Buissonne, so that all such hypothecation, ought to have preference, before all *later* legal special hopothecations, and also before the legal hypothecation, of the Government ;

“5thly. That, in regard to the store of P. L. Cloete, the same is mortgaged to him, by kusting, by which he has a right of hypothecation, preferent to all, even earlier *general* hypothecations.

“The Court, therefore, orders the Sequestrator, to correct the above mentioned draft, of the distribution account, of the estate of P. S. Buissonne, and to alter it, according to the principles herein laid down.”

Acting under the order of the Court, the Sequestrator, on the 6th September, 1824, made a *new* distribution, in which Government was ranked, on the proceeds of the house, for

the debt due by Buissinne, before the appellants and Van Reenen and Groenewald, in consequence of which, no funds remained, to satisfy the debts due to those creditors. On the 7th September following, this scheme was approved of by the Court, and their sentence promulgated on 15th December, 1824. Against this sentence, an appeal was noted, by the appellants, Van der Byl and Meyer. Van Reenen and Groenewald, did not appeal from this sentence, but immediately sued Woutersen, Chiappini, and others, who are bound as sureties for Buissinne in their bonds, and, on the 3d March, 1825, obtained a provisional sentence against the sureties, for the amount of the bonds. From this sentence the sureties appealed, on the 9th March, and on the 25th May, 1825, the late Court of Appeals, allowed, their appeal to be consolidated, with the appeal case of Van der Byl and Meyer *v.* the Sequestrator, and directed, the cases to be proceeded in, as one appeal. The Sequestrator, Kuys, having declined to support the sentence, appealed from His Majesty's Fiscal, lodged a memorial in the Court of Appeals, in support of the sentence, in so far, as the interest of Government was concerned, and the Attorney-General, having since come into the place of the Fiscal, is now to be considered, as the respondent.

In Re Insolvent estate of Buissinne. Van der Byl and Meyer *v.* Sequestrator and Attorney-General.

This case resolves itself into two questions:—

1st. Whether Government, has a tacit or legal hypothec, over all the property, of those officers, who are employed in the collection of the revenue, in security of the due payment to Government, of the revenue collected by such officers; and

2dly. Supposing Government, to have such a tacit hypothec, whether there are any circumstances, connected with the special hypothecs, which the appellants and Van Reenen and Groenewald, had over the house, which entitle those special hypothecs, to be considered as privileged, and, in consequence, to be preferred to an *anterior* tacit or legal general hypothec, over the property of Buissinne.

These, appear to be the only two questions, which the Court have now to decide.

1st. Because, on the part of the Government, it has been admitted, that the hypothec, claimed by Government, is not a privileged hypothec, but is only entitled, to have that effect given to it, which the law gives to tacit or legal general hypothecs.

2dly. Because it is admitted, on the part of the appellants, that the hypothec, claimed by Government, if it exists at all, must be considered to have been constituted at, and to have commenced from the 1st of March, 1820, when Buissinne, entered on his office, of receiver of land revenue. (*Vide* Croeser in *re* Buissinne, 5th June, 1829, *post*, p. 330.)

In Re Insol-
vent estate of
Buissonne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

3dly. Because it is admitted by the appellants, that, if Government has a legal hypothec, over the property of Buissonne, it extends, not only over the property, which he possessed, at the time of entering on his office, but over all such, as he, at any time afterwards, acquired. (*Vide Croeser in re Buissonne*, 5th June, 1829.)

4thly. Because it is admitted, on the part of Government, that a *posterior conventional* SPECIAL hypothec, is preferable, to a *prior conventional* general hypothec; and

5thly. Because it is admitted, by the appellants, that a *prior tacit*, or legal general hypothec, is to be preferred to *posterior, special* hypothecs, except in those cases, in which, owing to particular circumstances, a particular privilege is attached, to such special hypothecs.

The *Court is of opinion*, that the rules of the Civil and Dutch Law, as established in this colony, not only justified the parties, in making these admissions, but compelled them to do so.

First:—As to the question whether the Government possesses a right, of tacit or legal general hypothec, over the property of Buissonne, in consequence of his being an officer, employed in the collection of the revenue, and in security, of the due payment to Government, of the money received by him, as part of the revenue.

1. The *Court is of opinion*, that it has been clearly shown, that, according to the Civil Law, such right of legal hypothec, was enjoyed by the State, and that this rule of the Civil Law, was received by, and formed part of, the Law of Holland, at least, up to the year 1749. On this point, it is sufficient, to refer to the following authorities,—Voet 20: 2, 8; Van Leeuwen, Cens. For., 4: 9, 2; Van der Keessel, Theses 419 et 420.

The Placaat of the 22d July, 1749, has been admitted by both parties, to be the latest enactment of the law of Holland, on this subject, which is in force in this colony; and from its preamble, it appears, that it was intended, to be in lieu of the former law on the subject. This Placaat must, therefore, be considered, as the *regula regulans*, of the law of Holland, and, consequently, of this colony, on the subject of the right of the State, over the goods of those, who have any administration, of the public revenue.

By article 26 of that Placaat, it is enacted, that “all the property of the collectors and their assistants, as also of their sureties, whenever they are bound to provide sureties, and always of their wives, shall be bound and executable, for the moneys collected, on behalf of Government.”

The respondent maintains, that, by this article, a right of *tacit legal* hypothec, is given to the Government, over all the

property, of the collectors, their assistants, sureties, and wives; and, in support of this construction, the authority of Van der Linden may be quoted, who, in his *Institutes*, b. 1, c. 12, § 1, p. 173, Eng. edit., states, that "the law gives tacitly, without any agreement being necessary thereto, a right of legal hypothecation (*inter alia*), to the commonwealth, upon the property of those persons, who have had any administration, or receipt of the public moneys." To this passage there is annexed the following reference,—"*Boel on Loenius Decisions*, case 17, pp. 108–201, General Placaat of 22d July, 1749, art. 26." From this, it would appear that, in the opinion of Van der Linden, a right of legal hypothec was created, in favor of Government, by the 26th art. of the Placaat of 22d July, 1749.

In Re Insol-
vent estate of
Buissinne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

The appellants, on the other hand, have maintained that, as, by the 5th article of that Placaat, it is enacted, that "the taxgatherers or collectors, shall be obliged to give such bail, in favor of the commonwealth, and for the security thereof, as shall be required of them," the State was sufficiently secured, without being possessed of the right of legal hypothec, over the property of the collectors; and that, therefore, it was unnecessary for the State, to create, a right of legal hypothec, over the goods of the collectors of the revenue; and that the words, *the properties of the collectors, shall be bound and executable*, have, and were intended to have, no greater effect, than to create, in favor of Government, a right of hypothec, of the same nature, and possessing the same properties, as a right of *conventional* general hypothec, and, consequently, one, which must be postponed, to all *special* hypothecs; (*vide Croeser in re Buissinne*, 5th June, 1829;) and that the Government of this colony by requiring, in the instructions, issued for the office of Receiver-General, that this officer should find security, have placed themselves in the same situation, with the Government of Holland, and, in this case, in particular, must be considered, as having done so, in consequence of Buissinne having actually found security, to a very large amount, on entering on his office. In support of this opinion, the appellants have referred to Leybrecht's *Treatise on the duties of a Notary*, vol. 2, c. 36, p. 300, note *, where, in the list of those, who have a tacit hypothecation, or legal mortgage, he includes, "the republic, upon the property of her debtors, Grotius, l. 2, pt. 48, § 15, n. 16, in *notis*;" and then goes on to state, "It being, however, understood, that he has had some administration, of the revenue of the republic, and that the debt has arisen, out of such administration, otherwise not; as also not, in the case of a fine or penalty, no. 17. Therefore, the commonwealth has preference, by this *legal hypothecation*, upon the property of

In Re Insol-
vent estate of
Buissonne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

the farmers (*pachters*), of the imports of the country, before orphans, who have an anterior special hypothecation.* Holl. Cons. vol. 4, Cons. 189."

To this passage, he adds the following:—

* NOTE.—"Since by the discontinuance of the farmers (*pachters*), collectors have succeeded in their place, and who again, before entering upon their situation, are bound to provide approved securities, and that for the amount of one month's collections, it appears to me, that, for that reason, nothing has been enacted, concerning this preference, in the general Placaat, under date the 22d July, 1749."

The construction, put upon the Placaat, by the appellants, also receives considerable support, from the following argument. By article 5, of the Placaat, it is stipulated,—“The tax-gatherers, or collectors, shall be obliged to give such bail, in favor of the commonwealth, and for the security thereof, as shall be required of them, by our commissioned councillors, in the district, for which the aforesaid gatherers, or collectors, shall be appointed. And those gatherers or collectors, who are married, shall, moreover, before receiving their commission, be obliged, to cause to be passed, by their wives, an act of security, for the moneys to be collected, with the usual renunciation of the privileges, to which women are, by law, entitled, in regard to the dowries, or right of legal hypothecation, or for which they, by an ante-nuptial contract, may, in anywise, have stipulated; in like manner, as all gatherers and collectors, who may be unmarried, at the time of their being appointed, to such gathering or collection, and who may afterwards marry or remarry, shall be obliged, at the utmost, within the term of four weeks, after such marriage, to pass a similar act as above mentioned, on pain, on failure so to do, of being dismissed, from the situation of gatherer or collector.”

Now, by the law of Holland, a wife, for the recovery of her dowry, even when her claim is fortified by a marriage contract, has no preference, over the creditors of her husband, who are possessed of a right of legal hypothec, constituted prior to the marriage. If, therefore, a right of legal hypothec, had been constituted, in favor of the State, by the 26th article of the Placaat, it would have been quite superfluous to enact, that the wives of collectors, who married after their husbands were already in office, should renounce, in favor of Government, their right of hypothecation, because, independently of this renunciation, the right of legal hypothec, enjoyed by Government, having been constituted before the marriage, would have been preferable, to the hypothec of the wife, in virtue of the rule, *qui prior tempore potior in jure*. Voet 20: 2, 20, *in fine*; Van Leeuwen, Cens. For., 1; 12, 3; and 4: 11 5.

In answer to this argument, the respondent has maintained that, as, by the ancient law, the hypothec of a wife for her dowry, had much greater effect given to it, and as that effect had only been diminished, gradually, by a course of practice, which practice is even alleged, not to have been universal, throughout the whole of the Dutch provinces, the stipulation, for the renunciation of the wife's hypothec, although it might not be strictly necessary, was yet introduced, merely *ob majorem cautelam*, and with a view, of preventing all litigation on the point.

In Re Insol-
vent estate of
Buissonne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

2. The *Court is of opinion*, that, on examining the general Placaat 1749, nothing is to be found in it, which can lead to the belief, that by it, the Government of Holland intended, in any way, to *diminish* or *impair* the securities, which they formerly possessed, for the due collection of the revenue, and that, on the contrary, a careful consideration of the preamble, and whole tenor of that Placaat, almost necessarily leads to the inference, that the Government of Holland intended, to add to the former securities; and this opinion is further strengthened, by the fact, that previously to that Placaat, the Government of Holland, was in the practice, of requiring their pachters to find security,—a fact, which destroys the arguments, founded by the appellants, on the provision in the Placaat 1749, which requires collectors to find security.

The *Court is of opinion*, that the passage, quoted from Lybrecht is ambiguous, and will bear several other constructions, than that, put upon it, by the appellants.

The construction, put by the appellants on the note, viz., that, because the collectors were obliged, to provide approved securities, it was unnecessary for Government, to enact in the Placaat, that they should have a legal general hypothec, in order to secure their preference, and, that, in consequence of their not having made such enactment, no such rights of hypothec or preference, remain in their favor, is a very strained construction. The note, can be much more easily construed, to mean, that, in consequence of the abolition of pachters, and the substitution of collectors in their room, it was unnecessary to enact anything in the Placaat, about a preference, in favor of Government, on the goods of pachters. Or, the note may be construed thus, that, as collectors, with *approved securities*, were substituted in the room of pachters, it was unnecessary for Government, to continue to themselves, by an enactment in the Placaat, that particular preference, which the Government formerly had, on the goods of pachters, *before orphans having an anterior special hypothec*; consequently, that the note merely means, that Government no longer thought it necessary, to retain the privilege, of being preferred, on the goods of the persons, by whom the revenue was collected, to *ANTERIOR special hypothecs*, possessed by orphans.

In Re Insol-
vent estate of
Buissinne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

But, whatever may be the meaning of this passage, the *Court is of opinion*, that it cannot, as an authority, be put in competition with the passage, in which Van der Linden states, that Government have a legal hypothec, over the property of their collectors, in virtue of this very Placaat 1749.

The *Court is of opinion*, that the answer, made by the respondents, to the argument, which the appellants have founded on the provision in the Placaat, which requires the wives of collectors to renounce their legal hypothecs, in favour of Government, is sufficient to refute that argument.

On these grounds, the *Court is further of opinion*, that, by the law of Holland, subsequently to the Placaat 1749, the Government had a right of legal hypothec, over all the property of the collector of the revenue, and that, as the law of Holland, is the law of this colony, except in so far, as altered by colonial enactments, and as no colonial enactment has been made, altering the law on this subject, the Government of this colony, possesses a right of tacit hypothec, over all the property, of the collectors of the revenue of the colony, in security to Government, for the due payment of the money collected.

3. Such being the opinion of the Court, on the first question, it becomes necessary, to consider the second question in the case, viz., whether there are any circumstances, connected with the special hypothecs, which the appellants and Van Reenen and Groenewald, held over the house, which entitle those special hypothecs, to be considered as privileged, and, in consequence, to be preferred, to the anterior tacit, or legal general hypothec, which the Government possesses, over the property of Buissinne.

The facts of the case, appear to be, that the society "De Vriendschap," was indebted by personal bonds, to the appellants and Van Reenen and Groenewald, and that prior to the transfer of their house to Buissinne, the society agreed with him, that, instead of his paying down the whole price in ready money, he should, as part of the price, *simul et semel* with the execution of the deed of transfer in his favour, grant special mortgages over the house, to the abovementioned creditors of the society, and thereby relieve the society, of the obligations they were under to those creditors. The effect of this transaction, is precisely the same, as if Buissinne, at the time of the execution, of the deed of transfer, in his favor, had executed, in favor of the society, special mortgages, to the amount of the debts, due to the appellants and Van Reenen and Groenewald, and the society had afterwards assigned those special mortgages, to the appellants and Van Reenen and Groenewald, and, in consideration thereof, received a discharge of the debts, due to them by their creditors.

The effect of this transaction, is also precisely the same, as if the appellants and Van Reenen and Groenewald, had advanced money to Buissinne, to enable him to pay the price of the house, and had, at the same time, he received a transfer of the house, obtained from him, special mortgages over it, for the amount of their advances.

In Re Insol-
vent estate of
Buissinne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

On these grounds, the appellants maintain, that the bonds in their favor, which constitute their special hypothecs over the house, are precisely in the same situation with, and are entitled, to have the same legal effect given to them, which is enjoyed by, and given to, that description of security, known in the law of this colony, by the name of *kustingbrief*. In support of this opinion, they have referred to l. 7, Cod. *Qui potiores in pignore* (8. 18); Pothier Comment. ad Pandect. l. 20, tit. 4, art. 4, n. 27; Van Leeuwen, Cens. For., 4: 11, 6; Voet 20: 4, 18, *in medio*; Van der Keessel, Theses 427 and 437.

The Court is of opinion, that these authorities prove, that, by the law of Rome and of Holland, and, consequently, of this colony, special hypothecs, constituted over immoveable property, in favor of the seller of that property, for a part of the price, which the purchaser is allowed to retain on loan, or in favor of other persons, for money lent by them to the purchaser, in order to enable him, to pay the price of the property hypothecated, *provided the hypothec be constituted, at the time* (*vide Croeser in re Buissinne, 5th June, 1829*) that the transfer is made, in favor of the purchaser, are privileged hypothecs, and, as such, are preferred to prior tacit or legal hypothecs.

The respondent, indeed, does not deny, that hypothecs of this nature, which are recognised in the colony, by the name of *kustingbrief*, are considered privileged in law, and, in consequence, are preferred to prior legal hypothecs. But he has maintained, that, to give hypothecs such privileges, they must be constituted in the instrument itself, by which the property is transferred to the purchaser, and, in support of this proposition, refers to the authority of Voet, in the passage above quoted. In answer to this argument of the respondents, it is sufficient to state, that the law of the Code, by which such privileged hypothecs, seem first to have been recognised, does not require the constitution of the hypothec, in the deed of transfer itself, and that none of the other authors, whose authority has been referred to, require anything more to create the privilege, than that the hypothec should be constituted, *at the very time*, (*vide Croeser, in re Buissinne, 5th June, 1829*.) when the property is legally transferred to the purchaser. There appears therefore, no ground for believing, that, by the law of Holland, the constitution of the hypothec,

In Re Insol-
vent estate of
Buissonne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

in the deed of transference itself, was requisite, in order to render the hypothec privileged. But whatever may have been the law of Holland on this subject, there can be no doubt, that, in this colony, the insertion of the hypothec, in the deed of transference, is not requisite; for the Government of this colony, have established forms of deeds, for the transfer of property, and for that class of bonds, which, as has been already stated, the law of this colony recognizes, under the name of *kustingbrief*, and considers as privileged. Now, according to these forms, established by Government, the *kustingbrief*, is a separate and distinct instrument, from the deed of transfer, and no hypothecs of any kind, are ever constituted in the deed of transfer itself. It is impossible, therefore, for the respondent, to maintain, that the special hypothecs of the appellants, and of Van Reenen and Groenewald, are not entitled, to enjoy the privileges of *kustingbriefs*, merely, because they were not inserted in the deed, which transferred the property of the house to Buissonne.

The *Court is of opinion*, that the nature of the transaction, —the dates of the bonds, creating the special hypothecs, and the memorandum of those hypothecs, made in the deed of transference,—prove, beyond the possibility of question, that the bonds, creating the hypothecs, were executed by Buissonne, *simul et semel* with the execution of the deed of transfer in his favour.

The *Court is further of opinion*, that, in the circumstances of the case, these hypothecs, must be considered, as having been granted by Buissonne, over the house, either as securities for a part of the price, which he was allowed to retain on loan, or as securities, for money advanced to him, in order to enable him, to purchase the property of the house; that they are, consequently, to be considered, as possessing the privileges of *kustingbriefs*; and that they are, therefore, to be preferred and ranked, on the price of the house, before the legal hypothec, possessed by Government.

The *Court is also of opinion*, that, even, if the circumstances of the transaction, were such, as to prevent these bonds, coming within the strict legal definition of *kustingbriefs*, the same principles of equity, which induced the law of Rome and Holland, to bestow on *kustingbriefs*, the privilege of being preferred, to prior legal hypothecs, apply, in the present case, in favor of the special hypothecs, possessed by the appellants, and Van Reenen and Groenewald. (*Vide* Leeuwner v. Brink, trustee of Magadas, 25th August, 1840.) At the time of the constitution, of the legal hypothec, in favor of Government, the house was not the property of Buissonne; and the only ground, on which Government can maintain, that its hypothec, extended over the house, and

entitles it to a preference, over the whole of the price, for which the house was sold, is, that the house, at some time or other, wholly belonged to, or was entirely the property of Buissinne. Now, it is clear, from the circumstances of the transaction, that Buissinne never, for a single instant, had the absolute and entire property of the house, except under the burden of the hypothecs, of the appellants and Van Reenen and Groenewald. It was never, for a single instant, in his power to sell, dispose of, or impignorate the house, effectually, to any further extent, than to transfer that portion of the value of the house, which might remain, after satisfying the special hypothecs, held by the appellants and Van Reenen and Groenewald. The house, to the extent of the amount of the bonds, which the appellants and Van Reenen and Groenewald held over it, never was the property of Buissinne, but was the property of those creditors; and the present claim of Government, resolves itself into a demand, to have the debt, due by Buissinne to Government, paid out of the price, obtained for that, which never was his property, and which, during every instant, of the time that Buissinne had any interest in, or any connection with, the house, was the property of others. The equity of the case, is entirely in favor of the appellants.

In Re Insol-
vent estate of
Buissinne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney-
General.

On these grounds, the sentence of the Court is,—to reverse the sentence appealed from, and to send back the scheme of liquidation, of the property of Buissinne, to the Sequestrator, with directions to him to prepare a new scheme of liquidation, in which the special hypothecation, constituted by Buissinne, over the house in question, in security of debts, previously due by the society “De Vriendschap,” and taken over by Buissinne, at the time the deed of transfer of the house, in his favour, was executed, shall be ranked before the legal hypothec, possessed by Government, in security of the revenue, of which Buissinne was the collector: suspending the determination, of any other points, in the case of Woutersen, Chiappini, and Meyer v. Van Reenen and Groenewald, until the result of the liquidation, of Buissinne’s estate, according to the rule herein laid down, be ascertained; and reserving the decision, of the question of costs, until a motion, to have costs awarded, be made by some of the parties in the cause.

4. Thereafter (17th September, 1829,) Joubert and Cloete, for the appellants, moved for costs against the Government, and quoted Voet 42: 21 *et* 22; lib. 49, tit. 14.

The Attorney-General, refused to consent to the motion, at the same time stating, that he considered it more expedient, that Government should both pay and receive costs, instead of neither paying or receiving.

In Re Insol-
vent estate of
Buissinne.
Van der Byl
and Meyer
v.
Sequestrator
and Attorney
General.

The Court granted the applicants a rule, on Government, to show cause, why Government should not be condemned, to pay the costs.

Postea (24th September, 1829).—The Attorney-General, quoted Matthæus de Crim. L. 48, tit. 17, c. 4, and admitted, that the rule of the law of Holland, seemed against him in criminal cases, and that he could find no authorities, on the subject as to costs in civil cases.

It was admitted, that Government had been always in the practice, of claiming costs, and that the late Courts, sustained their claim to costs, in civil cases, and several cases were cited, to that effect. But no case was cited, in which Government had been condemned in costs, but whether this had been owing to any rule or principle, or to the exercise of the Court's discretion, did not appear.

The Court unanimously found, the appellants entitled, to their costs from Government, and gave judgment accordingly. *Vide* l. 6, Cod. de fruct. et lit. exp. (7. 51); Gothofredus in not. 37, ad Cod. de Sportulis, &c., (3. 2.) and Voet 42; 1, 21, et 22.

IN RE INSOLVENT ESTATE OF BUISSINNE.

CROESER v. SEQUESTRATOR AND ATTORNEY-GENERAL.

[5th June, 1829.]

1. *Special Conventional Mortgages, although for Purchase Money, but not constituted " simul et semel " with the transfer, not entitled to the privilege of " Kustingbricven."*
2. *Legal Hypothec of Government upon the property of Collectors, not impaired, by Government having taken Sureties from them.*
3. *Legal Hypothec of Government commences from date of appointment of such Collectors.*

In Re Insol-
vent estate of
Buissinne.
Croeser
v.
Sequestrator
and Attorney-
General.

1. In the same estate of Buissinne, the Court held, that a mortgage bond, which had been granted by Buissinne, over the house, purchased by him, from the said society, in favor of Stoll, from whom Croeser had acquired it by cession, and which was in every other respect, in the same situation, with Van der Byl and Meyer's bonds, was not entitled, to the privilege of a *kustingbrief*, because it had been passed, on the 13th September, instead of being passed *simul et semel* with the transfer of the house, on the 6th September.

2. And found, first, that Government had not relinquished, discharged, or impaired its tacit hypothec, over Buissinne's estate, by having taken from him, on his appointment, a bond, in security for Rds. 20,000, with two sureties. *Vide* Van der Linden's Instit., b. 1, c. 12, p. 173, *et seq.*, Eng. ed., and l. 21, *ff. qui potior.* (20. 4.)

In Re Insol-
vent estate of
Buissinne.
Croeser
v.
Sequestrator
and Attorney-
General.

3. Secondly, that the tacit legal hypothec of Government, commenced from the date of Buissinne's appointment, and not merely from the date, when he first fell into arrear to Government; and extended over, and applied to all property, belonging to him at, and at any time after, his appointment, and not merely to that, which belonged to him, at the time he fell into arrear, consequently, that in so far as Croeser's bond was concerned, the Government hypothec, attached to, and extended over the house in question, between the 6th and the 13th September, 1822, although there was no evidence, of his being in arrear to Government, before October, 1823; and gave judgment, against Croeser, with costs.

HARE, q.q., v. BIRD AND OTHERS.

[30th September, 1828.]

"*Causa Debiti*,"—when not necessary to be proved,—when not false.

Provisional sentence was claimed by the plaintiff, as the attorney, of Lord Charles Somerset, for payment of a bond, for £100,000, granted by Buissinne, in favor of De Vos, or the bearer, in which bond, the defendants bound themselves as sureties *pro rata*, and which, by a series of assignments, had come at last, into the possession of Lord C. Somerset.

Hare, qq.,
v.
Bird and
Others.

The defence against the claim, was, that the *causa debiti*, expressed in the bond, was false, it being therein stated, that the debt arose, from the purchase of certain horses, which the defendants offered to prove, never had been the property of De Vos, and consequently, could not have been purchased from De Vos, which the defendants maintained, the words of the bond represented, to have been the case, and that the horses had actually been in the possession of Buissinne, before the date of the bond, and quoted Pothier de Cont. and Obl., vol. 1, §§ 17, 18, 42.

But the defendants did not offer to prove, that the cause, in respect of which, Buissinne granted the bond, was not, the purchase by him, of those very horses, from some person, or that he did not actually grant the bond, for the price of those horses, which had been purchased by him, previously to the date thereof.

Hare, qq.,
v.
Bird and
Others.

The bond did not set forth, that the horses had been purchased from De Vos, and therefore, proof that they had been purchased from some other person, would not prove, that a false *causa debiti*, was set forth in the bond. There was no impossibility, that the bond had been granted, (as the plaintiff alleged was actually the fact,) in favor of De Vos, by desire of the person, from whom the horses had been purchased, to whom Buissinne was indebted for the price, in order to effect some arrangement, entered into, between that seller and De Vos.

On these grounds, Menzies, J., Burton, J., and Kekewich, J., were of opinion, that as the facts averred, were not relevant, if proved, to support the defence, the defendants should not be allowed, to go into the proof of them, and thereupon gave provisional sentence, with costs.

The Chief Justice, dissented from this judgment.

IN RE INSOLVENT ESTATE OF BECK.

SEQUESTRATOR v. GUARDIAN OF SLAVES AND BECK.

[9th September, 1828.]

1. *Children,—the meaning of the word, a question of fact.*
2. *Slaves.—The fiduciary heir and his representatives, have only a qualified right of property in the Slaves and their Children, bequeathed as "Fidei Commissum."*
"Partus sequitur ventrem."

In Re Insol-
vent estate of
Beck.
Sequestrator
v.
Guardian of
Slaves and
Beck.

The will of Hendrik Cloete, dated 29th July, 1799, contained the following provisions:—"It is the wish of the testator, that all his slaves, who have obtained the age of 60 years, shall not be sold, but may chose one of the heirs, with whom they may wish to live, (and this to do, as often, as their masters or mistresses may die,) who shall be bound, to provide such slaves, with necessary food and clothing, and to consider them as servants, worn out with age, of whom nothing but voluntary services, can be demanded; and, that the female slave Candasa, also, shall not be sold, nor her four children, Philip, Eva, Sienna, and Candasa, and such, as she may still procreate, the said Candasa, with her children, being after the death of the testator, to go in full property, to his daughter, Catherine, married to R. Beck, without the obligation, of paying anything for the same. And in case the said C. Beck, leaves any children at her death, the said Candasa, with her children, shall remain with, and for the said C. Beck's children,

but the said C. Beck, dying after the testator, without issue, then the said Candasa, without being taxed, may chose, one of the heirs to live with, and is to enjoy, what has been above directed, with regard to the slaves above 60 years, which her said *children*, and those still to be procreated by her, will in such case, also be at liberty to do, with this difference, that a moderately taxed price, shall be paid, by the person, with whom they may chose to live, to the other heirs, left by the testator, among whom, the testator expressly wishes to comprehend, his said son-in-law R. Beck, and in case the said C. Beck, may chose to emancipate, the said Candasa and her children, she shall be obliged, for the indemnification of the other heirs, to pay to the estate, for every one of the children, of the said Candasa, whom she may emancipate, a sum of Rds. 100."

In Re Insol-
vent estate of
Beck.
Sequestrator
v.
Guardian of
Slaves and
Beck.

Catherine Cloete, was married to R. Beck, in communion of goods. R. Beck became insolvent, and his estate was surrendered to the Sequestrator, who maintained, that he was entitled, to sell the children of Candasa's daughters, as part of the disposable joint estate, of the said Beck and his wife Catherine, (*Vide* Brissonius, *voce Liberi*; Averanius, l. 3, c. 25, § 30.)

This was opposed, by the Guardian of Slaves, and by Beck's son, who maintained, that under the above will, Mrs. Beck, and consequently her husband, could not alienate Candasa, her children, or her daughter's children, who must remain *with, and for* him, Mrs. Beck's son, after her death. (*Vide* l. 3, Cod. *de Fidei Com. Libert.* (7. 4); l. 53, D. *de Fideic. Libert.* (40. 5); Voet 36: 1, §§ 71, 72, 62, and 30: 1, § 2; Van der Linden's Institutes, b. 1, c. 9, § 8, p. 137, Eng. ed.)

1. The *Court held*, that *children*, (*kinderen*.) was a flexible term, used sometimes, to signify only sons and daughters, and sometimes all descendants. That the signification, to be given to this term, in any particular case, is not a question of law, but of fact, namely, with what intention, did the maker of the deed, use the term? Voet 36: 1, 22. The *Court held*, that in this case, the testator intended, to use the term "*children*," to signify the immediate offspring of Candasa, and not her grand-children, or remoter descendants, and that he left the right of property, in her grand-children, by her daughters, and their descendants, to be determined, according to the ordinary rules of law, on the subject.

2. R. Beck, and the Sequestrator as representing him, and his creditors, can have no other, or greater right of property, in Candasa and her descendants, than Mrs. Beck herself would have had, if she had been unmarried.

The words: "*shall remain with, and for* her children," qualify the words, "*to go over in full property*," and create

In Re Insol-
vent estate of
Beck.
Sequestrator
v.
Guardian of
Slaves and
Beck.

no more, than a *fidei commissum*, in the person of Mrs. Beck, —a right of property in her, qualified and limited, by a reversionary right, in favor of her children.

Consequently, Mrs. Beck, could not alienate, by sale, gift, or in any other way, Candasa, or her immediate children, to the prejudice of the right to them, created by the will, in favor of her, Mrs. Beck's, own children.

The only ground in law, on which Mrs. Beck, could claim any right of property, in the offspring of Candasa's daughters, is, that those daughters, belonged in property to her, and that *partus sequitur ventrem*. Mrs. Beck, could not claim, any greater or other right, in the children of these daughters, than she possessed in their mothers, the daughters of Candasa. But it has been shown that she possessed, no absolute right of property in those mothers, but only a limited right, qualified by a reversionary right, bestowed by the will, on her, Mrs. Beck's, own children. Any right, which she has, in the children of Candasa's daughters, must therefore be limited and qualified, by a similar reversionary right, in favor of her, Mrs. Beck's, children.

On these grounds, the *Court held*, that Mrs. Beck, and consequently her husband, could not alienate the children of Candasa's daughter's, in any way, to the prejudice of the reversionary right, of her son, the present claimant, or, in so far, as the reversionary right, could be shown to be beneficial, to those grand-children of Candasa,—to their prejudice. Consequently, that the claim of the Sequestrator, to be allowed to sell those grand-children, for the benefit of R. Beck's creditors, must be rejected.

Sequestrator's claim accordingly dismissed, with costs.

SCHMIDT v. FRANCKE.

[December, 1828.]

Arbitration.—*When an Agreement, to submit all future disputes, to the Arbitration of uncertain persons, cannot be enforced by the Court.*

Schmidt
v.
Francke.

In 1812, the appellant and respondent entered into a deed of co-partnership, by the 5th article of which, it was stipulated, "that all books, which shall be used for this partnership, shall be kept by said Schmidt, and considered as his property, but the said Francke shall be at liberty, as often as he chooses, to inspect the same, and if necessary obtain a copy thereof."

And by the 10th article, "that all disputes, which may unfortunately arise, respecting the contents of this contract, shall be submitted, to the arbitration of good men, one to be chosen by each party, *and, in case either party, shall deviate herefrom, by commencing legal proceedings, the plaintiff shall pay the defendant, a fine of Rds. 2000, previous to his being admitted, to bring his case into Court.*"

Schmidt
v.
Francke.

This co-partnership was dissolved, on the 12th June, 1818, when, in a memorandum, annexed to an account-current, made out between the parties, the respondent "acknowledged to be indebted to said Schmidt, a balance as above mentioned, of Rds. 2042, for which sum, he undertakes, immediately to pass a notarial bond."

On the 9th July, 1818, the respondent did pass a notarial bond in favor of the appellant, for the said sum.

On the 15th July, 1819, the appellant obtained final judgment, against the respondent, on this bond, and having put this judgment into execution, through the Sequestrator, obtained payment thereof, on the 1st September, 1819.

On the 27th November, 1827, the appellant was served with an insinuation, to allow the respondent, to inspect, and take copies of the partnership books, in terms of article 5, of the contract, or in default thereof, to submit the question, as to his obligation to do so, to arbitration, in terms of the 10th article, and to name his arbitrator.

The appellant having failed, to comply with both demands, was summoned before the late Court of Justice, on the 6th December, 1827, to hear claim made, that he should be condemned, within a fixed period, to name an arbitrator, who with another arbitrator, to be named by the plaintiff, should inquire into, and determine upon a certain difference, at present existing between the plaintiff and the defendant, respecting the continuance of the defendant's liability, under the 5th article of the contract of co-partnership, and to allow the plaintiff, to inspect, and take copies, of the books of the co-partnership, as often as he shall choose so to do, with costs.

The said Court, on that day, condemned the appellant, to fulfil the 10th article of the said contract, as prayed *peremptorie*, within four weeks from that date.

The appellant appealed from this sentence to this Court.

Having heard parties, the *Court reversed*, the sentence appealed from, and dismissed the plaintiff's action, with costs.

On the ground, that an agreement, to refer all differences or disputes, which may thereafter arise, between the contracting parties, *to the decision of arbitrators, thereafter to be named by the parties*, is one, to enforce which, an action

Schmidt
v.
Francke.

cannot be sustained.* That the agreement is one, which it is out of the power, of any Court, duly to enforce.

That supposing, that the Court should find, that the appellant was bound, and should order him, to name an arbitrator, and he should refuse to do so; it would be impossible for the Court, to assess any sum, as damages to the plaintiff, for the loss he had sustained, by the defendant's not doing that, which the Court had found, he was under an obligation to do. And the Court could not allow the plaintiff, by means of its process, to imprison the defendant, in order to enforce performance by the defendant, of an obligation, or an order, from the non-performance of which, the plaintiff could not possibly show, that he had sustained, any actual loss or damage whatsoever.

No authority has been quoted, from the civil law, or the law of Holland, to show, that such agreements, either ought to be, or can be enforced, by Courts of law;—that they would not be enforced by the law of England, is proved, by the decisions *Mitchell v. Haries*, 2 Ves. Rep. p. 129; *Tattersall v. Groote*, 2 Bos. & Pal. p. 134; *Strutt v. Rigby*, 6 Ves. Rep. p. 815; or by the law of Scotland, by the decisions *Milne v. The Magistrates of Edinburgh*, finally decided in the House of Lords on Appeal, 15th February, 1770; *Buchanan v. Murshead and others*, 25th June, 1799, Mor. Dict. p. 14593; and *Davidson v. Oswald*, 28th February, 1810, Fac. Coll. p. 607.

The Court did not intend, by this judgment, to decide, that no action will lie, on such an agreement, when the parties have themselves, in the agreement, assessed the amount of damages, for non-performance, by stipulating a certain penalty, for non-performance. But in this case, there is no penalty stipulated, in case of any of the parties, refusing to appoint an arbitrator. The fine of Rds. 2000, is only stipulated, to be paid, *by the plaintiff, who shall commence legal proceedings, to the defendant*, before being permitted, to bring his action into Court, and the appellant is not the plaintiff, but the defendant, and instead of having commenced legal proceedings, against the respondent, has been forced into Court, as a defendant by the respondent.

* Quid, per civil imprisonment.—Moribus nostris nemo liberari potest præstando id quod interest, sed præcise ad factum cogi potest. Consul. Van der Keessel, Thesis 512; Neostad, Supr. Cur. Dec. 50; Voet 12: 1, 35, *et aut. ib. cit.*; *ib.*, 42: 1, 35, 36; 42: 3, 5; Van der Linden, in note on Pothier Contr., pt. 1, c. 2, § 157; and in Institutes b. 3, pt. 1, c. 9, § 14. On this principle, of compelling the *præstationem facti*, by means of *gyzeling*, a case was decided by the Privy Council in Appeal from Berbice, see 2 Moore's Reports of Cas. of Privy Council, pp. 93 and 103, in *re Retemeyer v. Obermuller* (1838). Consenm. Voet 4: 8, 3, *et* 14; Groenewegen ad l. 13, ff. 4, 8; Van der Linden, Supp. ad Voet 4: 8, § 3.—[Ed.]

HECKROODT *v.* BREDÁ.

[16th December, 1828.]

1. *Oath in Supplement, not taken without "semi plena probatio."*
2. *Seduction,—not provable by the mere Oath, of the Woman only.*
3. *Purgatory Oath, in case of alleged Seduction.*
4. *Affiliation,—not provable by mere Oath of the Mother.*

In this case, the appellant had brought an action, against the respondent, for marriage, or otherwise for damages for seduction,—inlying expenses, and aliment for her bastard child, of whom she alleged, the plaintiff was the father.

Heckroodt
v.
Breda.

The appellant, while in labour, had solemnly declared, that the respondent was the father of the child, and failing to produce evidence *aliunde*, maintained, that she should be allowed, to give oath that such was the fact.

The Court below, rejected the appellant's claim, for marriage, and also, her claim for damages, &c., with costs, provided, with respect to the latter claim, that the respondent should make oath, that he had never had carnal connexion with the appellant, and on his failing to do so, condemned him to pay Rds. 500, as damages for the seduction; Rds. 150 for inlying expenses, and Rds. 15 per month, for the aliment of the child.

Against this judgment, the appellant appealed, and now contended, that she, and not the respondent, should be allowed, to make oath as to the fact, of the respondent having had carnal connexion with her.

The respondent quoted Grotius *Inl.* 3, c. 35, § 8, n. 22, *ibique* Groenewegen; Van der Linden, *Inst.*, b. 1, c. 16, § 4, not. 2, p. 251; Voet 48: 5, 3.

In respect of these authorities, and of the fact, that the appellant had not, in the late Court of Justice, brought any evidence, amounting to a *semi plena probatio*, or sufficient even, to warrant a suspicion, (*vide* Richter *v.* Wagenaar, 20th March, 1829, *supra* p. 262,) that the respondent had had any familiarities, or any opportunity, for carnal connexion with the appellant, were unanimously of opinion, that the judgment appealed from, was right, and affirmed it, with costs.

ROUSSEAU v. BIEMAN.

[21st December, 1828.]

1. *Surety,—discharged by the Creditor's failure to cause special Mortgage of Slaves to be registered. Mortgage of Slaves must be enregistered in Slave Registry to be effectual.*
2. *Surety,—discharged by Creditor taking a less effectual obligation from a Co-surety than that agreed on and originally set forth in the Bond.*

Rousseau
v.
Bierman.

Provisional sentence was claimed, by the plaintiff against the defendant, on a bond, granted by Laubscher in his favor, whereby in security of the debt, Laubscher mortgaged three slaves, and in which the defendant had bound himself, as surety and joint principal debtor.

1. The defendant pleaded, first, that he was discharged from his liability, because the creditor did not cause the proper steps to be taken, for making the mortgage of the slaves effectual, required by the 9th section of the Proclamation of 30th January, 1818, whereby the bond itself, has been rendered null and void, or at all events, whereby the plaintiff cannot now, make to the defendant that effectual cession, of the mortgage of the slaves, which the defendant, on paying the debt, would be entitled to require from him.

2. Secondly, because at the time, the defendant agreed to become surety, it was agreed, that one Esterhuyzen, was to bind himself as co-surety with him, and when the defendant signed the bond, it then set forth, (although not signed by the latter,) that Esterhuyzen bound himself, as co-surety to the same extent, as the defendant, and because the plaintiff, instead of obtaining Esterhuyzen's signature to the bond, took from him an underhand obligation, annexed to the bond, wherein he bound himself, merely, as surety for the debtor to the plaintiff, for Rds. 870, without renunciation of the *beneficia divisionis et excussionis*, the nature of which obligation, was such, that if the defendant paid the debt to the plaintiff, he, the defendant, would not have that relief against Esterhuyzen, which he would have had, if the latter had bound himself, as originally stipulated, and set forth in the bond.

The bond sued on, contained, at that part, wherein it is stated, that the defendant and Esterhuyzen, appeared and declared to bind themselves, as sureties, the following words, "*the last-mentioned by an underhand obligation hereunto annexed,*" which had been interlined by the notary, as the defendant alleged, after he had signed the bond, and without his knowledge or consent.

The Court refused provisional sentence, with costs.

✓ WEHR v. VAN DER POEL.

[23d December, 1828.]

Forgery.—Recovery of the amount paid with a Forged Bank Note.

The plaintiff brought this action, against the defendant, to recover the value of a forged Government bank note, for Rds. 200, which was stopped by the bank, as forged, when presented for payment, and which he alleged, had been paid him, by the defendant.

Wehr
v.
Van der Poel.

The Court held, that this allegation was proved, and gave judgment for the plaintiff, as prayed, with costs.*

IN RE INSOLVENT ESTATE OF VAN AS.

WHITCOMB v. EXECUTORS OF VAN AS, AND DISCOUNT BANK v. EXECUTORS OF VAN AS.

[31st December, 1828.]

Assignment—by an uncertificated Insolvent, of Property, acquired after Insolvency,—when good.

Insolvent—uncertificated—his Estate entitled to Property acquired after Insolvency.

Arrest—on Money—held good.

The estate of Van As, which had been placed under sequestration, as insolvent, having been finally liquidated, was insufficient to pay the debts due to the Discount Bank, who consequently, remained creditors, of Van As for its amount.

Van As did not obtain his rehabilitation.

Van As afterwards became entitled to Rds. 1400, out of the estate of his deceased mother. While this sum remained still unpaid in the hands of his mother's executors, Whitcomb, at the request of Van As, granted a discharge of a debt of Rds. 1053, due to him, by Van As's mistress, Hertzog, for which she had been imprisoned, at his instance, and released her from prison.

In consideration of which, Van As, by a regular deed of assignation, assigned to Whitcomb, all his right, title, and interest in and to his mother's estate, and they entered into

In Re Insol-
vent estate of
Van As.
Whitcomb
v.
Executors of
Van As,
and Discount
Bank
v.
Executors of
Van As.

* Ita opinatur Reitz in nota ad Heinneccium, Wisselregt, c. 7, pt. 2, § 11.—[Ed.]

In Re Insol-
vent estate of
Van As.
Whitcomb
v.
Executors of
Van As,
and Discount
Bank
v.
Executors of
Van As.

an agreement, that after repaying himself, the Rds. 1053, for which he had granted a discharge to Hertzog, he should account to Van As, for the balance.

Whitcomb then sued the executors, to pay him the sum, due to Van As, out of his mother's funds, in their hands. After this, the Discount Bank, as creditors of Van As, in the debt abovementioned, laid an arrest on these funds, in the hands of the executors, and summoned them, to hear the arrest confirmed.

These two cases, were heard by the Court, together, when the Court gave judgment, in favor of Whitcomb, against the executors, for the Rds. 1053, for which he had granted Hertzog her discharge, with costs; and confirmed the arrest, in favor of the Discount Bank for the balance.

IN RE INSOLVENT ESTATE OF BRINK.

VENDUE-COMMISSARIES v. BRINK.

[31st December, 1828.]

Regulations and Instructions—of Vendue, not promulgated, have no force of Law.

Promulgation—of Law, necessary to give it force, not cured by knowledge of its existence, nor by general belief of its having force of Law.

Vendue—no legal preference on goods sold at Vendue.

Hypothec—tacit or legal, created by Instructions, not promulgated, of no force.

Proclamation of 22d April, 1825—of what effect.

In Re Insol-
vent estate of
Brink.
Vendue-
Commissaries
v.
Brink.

Andries Brink, made certain purchases at a sale, held by the Vendue-Commissaries. Thereafter, he granted a bond, in favor of Daniel Brink, in which he specially hypothecated certain slaves, in security of a debt, due by him to Daniel Brink, by a private bond, passed by Andries in favor of Daniel, dated 5th July, 1823.

After having granted this bond, and within six months after the purchase, from the Vendue-Commissaries, he became insolvent, and his estate was placed under sequestration.

The Sequestrator, ranked Daniel's bond, as preferable on the proceeds, of the sale of the slaves therein mortgaged.

The Commissaries of Vendue, objected to the preference, so awarded to Daniel Brink, and maintained, that during the period, of the first six months, after the sale, made by them to Andries Brink, they were entitled, to a preference on the

assets of his estate, before all special mortgages, passed by him after the sale, by virtue of the regulations and instructions, issued by Lord Caledon, to the Vendue-master of the Cape District, under his hand and seal, on the 1st June, 1808, when Mr. Fagel, had been appointed Vendue-master, and that office remodelled.

In Re Insol-
vent estate of
Brink.
Vendue-
Commissaries
v.
Brink.

Cloete, for Daniel Brink, maintained, that those instructions, had never been duly published or promulgated, and therefore, have no effect as law, and quoted Voet 1 : 3, §§ 9 and 10.

Mr. Fagel's appointment, was in the following terms :—

“By His Excellency, DU PRE, EARL OF CALEDON, &c., &c.,
&c., Governor, &c., &c.,

“To F. W. FAGEL, Esq.

“By virtue of the powers and authorities, vested in me, I have constituted and appointed, and by these presents, do constitute and appoint you, F. W. Fagel, sole Vendue-master, in Cape Town and District, to have, hold, exercise, and enjoy the said office, and to perform all the duties, which belong thereto, for, during, &c., &c., *according to* the instructions and regulations, hereunto annexed, and subject to such laws and customs, as are in force, within this settlement, with regard to the same.

“Given under my hand and seal, at the Castle of Good Hope, this 1st day of June, 1808.

(Signed) “CALEDON.

“By His Excellency's command,

(Signed) “C. BIRD, Acting Secretary.”

To this deed of appointment, were annexed,—

“*Regulations and Instructions, for the Vendue-master in the District of the Cape.*

(of which the following, were the 10th and 11th articles:)

“§ 10. To secure the Vendue-master, from loss by bad debts, he has, 1st, a legal or tacit hypothetical claim, upon the property, sold by him by auction, if found in the possession of the purchaser, within six months, after the date of the purchase; (*vide* Commissaries of Vendue v. The Sequestrator, in *re* Lolly, 19th March, 1829;) 2dly. He has preference in that period, to all general obligations (mortgages), whether by secretarial or notarial deeds; but special obligations (mortgages), whether by secretarial or notarial deeds, of an older date than the day of the sale, at which the debt is incurred, shall remain preferable, to the legal claim of the Vendue-master; 3dly. He has the privilege, of proceeding against the debtor, by *parata executio*, according to the existing laws on that head.

In Re Insol-
vent estate of
Brink.
Vendue-
Commissaries
v.
Brink.

"§ 11. The Vendue-master, is further entitled, to all such privileges and protection, as were granted to the Vendue-master of the Cape District, at the time of that office, having been instituted in this settlement, in the year 1793.

" Castle of Good Hope, 1st June, 1808.

" By Command of His Excellency the Governor,

" C. BIRD, Acting Secretary."

The only publication, which was at any time inserted in the *Cape Gazette*, or made in any other manner, with reference to the appointment of Mr. Fagel, or the constitution of the office, is the following advertisement, inserted in the *Cape Gazette* :—

" GOVERNMENT ADVERTISEMENT.

" Notice is hereby given, that His Excellency the Governor and Commander-in-Chief, has been pleased, to appoint, F. W. Fagel, Esq., as sole Vendue-master, in Cape Town and its district.

" Castle of Good Hope, 1st June, 1808.

" By Command of His Excellency the Governor,

(Signed) " C. BIRD, Acting Secretary."

In the *Cape Gazette*, of the 7th December, 1816, the two following advertisements were inserted :—

" GOVERNMENT ADVERTISEMENT.

" Notice is hereby given, that F. W. Fagel, having resigned the office of Vendue-master, upon his return to Holland, the place of Vendue-master, has been done away, *but the duties of the Vendue-office will however be conducted, under the same regulations, as heretofore, by a Commissary of Vendues.*

" Cape of Good Hope, 6th December, 1816.

" By Command of His Excellency the Governor,

(Signed) " H. ALEXANDER, Secretary."

" GOVERNMENT ADVERTISEMENT.

" Notice is hereby given, that His Excellency the Governor and Commander-in-Chief, has been pleased, to make the following appointments,—J. F. Reitz, Esq., to be Commissary of Vendues ; Mr. E. Buyskes, to be Assistant do.

" Cape of Good Hope, 6th December, 1816.

" By Command of His Excellency the Governor,

(Signed) " H. ALEXANDER, Secretary."

In the *Cape Gazette*, of the 17th April, 1824, the following advertisement, as to the appointment of the present plaintiffs, was inserted :—

"GOVERNMENT ADVERTISEMENT.

"His Excellency the Governor has been pleased to appoint C. A. Fitzroy, Esq., and E. A. Buyskes, Esq., to be joint Commissaries of Vendues.

"Cape of Good Hope, 16th April, 1824.

"By Command of His Excellency the Governor,

(Signed)

"C. BIRD, Secretary."

In Re Insol-
vent estate of
Brink.
Vendue-
Commissaries
v.
Brink.

The *Court held*, that by virtue of the documents, above quoted, the regulations and instructions, issued by Lord Caledon, to Mr. Fagel, applied, to the office of joint Commissaries of Vendues, held by the plaintiffs, as fully, and with the same legal effect, as they had applied, to the office of Vendue-master, held by Mr. Fagel.

The *Court held*, 1st, that no tacit hypothec, or legal preference, of the nature of that, now claimed by the plaintiffs, has ever been enacted, or declared to exist, except in the regulations and instructions, issued by Lord Caledon, to Mr. Fagel, on the 1st June, 1808.

2dly. That these regulations, were never duly promulgated as laws.

3dly. That by reason of their not having been duly promulgated, these regulations never did, and could not, acquire or obtain, the force and effect of laws in this colony.

4thly. That, although in consequence of a general belief, that those regulations had the force of law, they had been acted on, and given effect to, as laws, frequently, during the twenty years, which had elapsed, since they were issued to Mr. Fagel, without their validity as law, having ever been disputed,—this practice, or acquiescence, could not remedy the defect, arising from want of due promulgation, or warrant effect, being given to them, as law, where their validity as such, was desired.

5thly. That even, although it had been proved, (which it had not,) that the defendant knew, of the existence of Lord Caledon's regulations, and of the instructions of the Government of this colony, that they should be made laws, this would not have the effect, of causing him to be bound by them. (*Vide Voet 1: 3, § 10.*)

6th. That, whatever effect, the Court might be bound in law, to give to these regulations, in a question, between the Government and its Commissaries on the one part,* and the owner or purchaser of the goods, sold by vendue, on the other, by reason of any contract, either express or tacit, deemed to have taken place, between those parties, that the conditions,

* As to the validity and effect of these regulations, as between the Government and the Vendue-Commissaries, consul. Van der Linden, Supplement to Voet 1: 3, 10.—[Ed.]

In Re Insol-
vent estate of
Brink.
Vendue-
Commissaries
v.
Brink.

contained in the regulations, (whether enacted by law, or merely stipulated by Government and its officers,) should be binding, on all the parties to the transaction;—the defendant could not be bound by this contract, or any equitable obligation arising out of it, seeing, that he had been, in no way whatever, a party to the transaction.

On these grounds, the *Court held*, that the plaintiffs are not entitled, to any preference, on any part of the assets, of the insolvent estate, of the nature of that, which in virtue of the regulations and instructions, issued by Lord Caledon, on the 1st June, 1808, they have claimed, and that the defendant is entitled to the preference, awarded to him by the Sequestrator, over the proceeds of the slaves, specially mortgaged to him, in his bond of the 17th July, 1827; and discharged the rule, which the plaintiffs had obtained to show cause, why in this respect, the scheme of liquidation, framed by the Sequestrator, should not be allowed, with costs.

The defendant founded an argument, on the 4th and 5th articles, of the Proclamation of the 22d April, 1825, to show, that even although Lord Caledon's regulations, might have been in force, previously, no effect could be given to them, after the promulgation of that Proclamation. But the *Court decided* the case, solely on the grounds, above set forth, without reference to this Proclamation.

With reference to the argument, which the plaintiffs had founded on the hardship which would be occasioned to them by this decision, in consequence of the loss, they would suffer, by being deprived of that right of preference, in the faith of enjoying which, they had accepted office, the *Court observed*, that this decision did not decide, upon whom such loss would ultimately fall. That seeing, that by the constitution of the office of Vendue-master, in favor of Mr. Fagel, and of that of joint Commissaries in favour of the plaintiffs, the Government might be deemed to have undertaken, in order to secure those officers, from loss by bad debts, that they should, have for six months, a general legal hypothec on the property of purchasers at vendue, which should be preferable, to all special mortgages, constituted after the sale, and that by not having promulgated, Lord Caledon's regulations, the enjoyment of this preferable hypothec, has not been secured to the Commissaries, a question may arise, whether Government can claim from the Commissaries, the amount of the price of any property, sold by vendue, which the Commissaries have been unable to recover from the purchasers, but which might have been recovered by them, if they had possessed, the preferable legal hypothec, which in the regulations, issued by Lord Caledon, the Government professed to secure to them.

On this question, however, the Court abstained, from expressing any opinion.

MEYBERGH v. THE COMMISSIONER FOR THE SEQUESTRATOR.

[7th January, 1829, 14th December, 1830.]

Trustee,—when personally liable for Costs improperly incurred.

The agent of the Sequestrator, at Stellenbosch, caused certain property, belonging to an insolvent estate, to be sold by auction.

Meybergh
v.
The Commissioner for the
Sequestrator.

A question arose, whether, in respect of the manner, in which the biddings had been made, when sold by the fall, Meybergh was to be deemed the purchaser, at f 4000 or Lindenberg for f 1400.

The auctioneer, the brother of Lindenberg, declared, his brother to be the purchaser, but directed the clerk, not to insert his name, in the vendue-roll as purchaser, until the Sequestrator, of the district of Stellenbosch, should decide the question.

Meybergh and the auctioneer, wished to put the property up again for sale, but Lindenberg would not consent.

Thereafter, Meybergh insinuated, the Commissioner for the Sequestrator, to transfer to him the property, offering to pay f 4100, the highest of the disputed biddings.

On the Sequestrator refusing, the plaintiff brought this action, to compel him to do so. The Sequestrator, without giving notice to Lindenberg, to assert his claim, if he meant to insist on it,* defended the action, and set up Lindenberg's claim, as his defence.

No appearance was made for Lindenberg.

The Court, after hearing the evidence, *found*, that the plaintiff was the purchaser, and gave judgment for him, *with costs*; leaving it to the creditors of the insolvent estate, to try the question, whether such costs, should be paid, out of the insolvent estate, or by the Commissioner for the Sequestrator, or those, who had authorised the defence.

Thereafter, the Sequestrator, ranked these costs, as a preferent debt, in the assets of the estate, as being part of the expenses, incurred in the distribution thereof. But the Court, on the motion of Meybergh, and after hearing the Commissioner for the Sequestrator, ordered the scheme of distribution to be altered, and those costs to be expunged, as a claim against the assets of the estate.

14th December,
1830.

* Cons.Voet 21 : 2, 20; Schorer ad Grot. Intro., 3 : 15, § 4, n. 15.—[Ed.]

LUCK & DEANE v. MUNTINGH.

[7th January, 1829.]

Shipping,—freight when payable, for whole period, although first trip unsuccessful.

Luck &
Deane
v.
Muntingh.

The defendant chartered, the schooner *Good Intent*, (19 tons and 3 men,) from the plaintiffs, at so much per month, to proceed from Table Bay, to Tristan D'Acunha and the Inaccessible Island, to bring off some men, who had been left there sealing, on the defendant's account, and such oil and skins, as they had, and such further cargo, from Tristan D'Acunha, as the schooner could carry, and should be put on board, by the defendant's agents, or to his order.

It was proved, that the schooner, after a long voyage, owing to contrary winds, reached Tristan D'Acunha, where she learned, that the men were at Inaccessible Island, for which she sailed, but without being able to communicate with that island, was blown off, several hundred miles to the eastward, by very heavy gales, in the course of which, she was laid on her beam ends, and lost all her water, except from 10 to 18 gallons.

The gales from the west still continued, and after trying for three days, to beat up, against them, to Tristan D'Acunha the master bore up for Table Bay.

On his arrival there, the defendant refused, to pay any freight whatever, for the term, spent in this attempt, alleging, that the vessel, had been unfit for the voyage, and protested, against being made liable, for any expense, incurred in making any other attempt, to complete the voyage. The vessel, however, immediately took in provisions and water, sailed, and after calling at Tristan D'Acunha, reached Inaccessible Island, from which they succeeded in taking off the men, but owing to stress of weather, could not get off, any of the oil or skins. The schooner then returned to Tristan D'Acunha, and took on board, what oil was offered by the defendant's agent, with which she arrived safe in Table Bay, when the plaintiffs brought this action, to recover the freight from the defendant. (*Vide Guthrie v. Muntingh*, 18th September, 1829.)

The Court held, that it was proved, that the plaintiffs and the master, had done everything possible, to complete the voyage, contracted for, in as short a time as was possible, and that the vessel, had therefore earned full freight, for the whole period, during which she had been employed; * and gave judgment against the defendant, for the full freight, with costs.

* Confirm. Barel's Advies over Koophandel en Zeevaart, vol. 1, Adv. 7, p. 28.—[Ed.]



WALLACE *v.* HILL AND SCHENIMAN.

[8th October, 1828.]

HILL *v.* WALLACE.

[23d January, 1829.]

1. *Defamation,—Action brought by one Passenger, a Foreigner, against the other, also a Foreigner, for Defamation at this place.*
2. *Assault,—Action brought by one Passenger against the other, for Assault at Sea.*
3. *Justification,—of Assault in respect of Verbal Provocation.*
4. *Arrest “Judicio Sisti,”—between two Passengers, Foreigners, for Acts done at Sea.*

1. The *Duke of Bedford*, arrived in Table Bay, on her voyage from India to England. Much quarrelling had taken place among the passengers, who were divided into two parties, one, headed by the owner of the vessel, and the other, by the Captain. It was proved, that on a certain evening, in consequence of the plaintiff, Capt. Wallace, interfering, on the part of the owner, the defendant, Lieut. Hill, used the expression, “there is a pair of you.” Wallace asked, if he applied that expression to him. Hill said, he did. Wallace then said “I know you.” Hill said, “you do not know me.” Wallace said, “I know you are a sneak.” Hill said, “you are neither an officer nor a gentleman.” Wallace then came from the poop, to the capstan, and struck Hill, a violent blow with his hand (whether open or shut did not clearly appear). Wallace was stronger than Hill, who was a little man, and weak from illness. On landing here, Hill challenged Wallace, who refused to meet him. Hill, and his second, Dr. Scheniman, posted Wallace, as a “coward.” Wallace brought an action against them for defamation, on account of this, when the Supreme Court, (Menzies, J., absent,) gave judgment for the plaintiff, against them, for £100 damages, with costs. 8th Oct. 1828.

Wallace
v.
Hill and
Scheniman.

2. Hill, then brought an action against Wallace, for the abovementioned assault, and proved the above facts.

Hill
v.
Wallace.

3. Wallace led no evidence, but pleaded justification, in respect of the verbal provocation, given him by Hill, by using the expressions above set forth.

The Court, (all the Judges present,) gave judgment for the plaintiff, for £120 damages, with costs. 23d January, 1829.

4. In this case, the plaintiff had commenced his proceedings, by causing the defendant to be arrested, (*judicio sisti et*

Hill
v.
Wallace.

judicatum solvi.) on a writ, issued in terms of the 8th Rule of Court. No objection was made by the defendant, and consequently, no decision given, as to the validity of this arrest, or to the jurisdiction of this Court, in a case, where the cause of action, had occurred at sea in a ship, in which both plaintiff and defendant, were passengers, and in which they were both proceeding to England, their proper *forum*.

Consequently, this case, cannot be considered as any precedent, in either of those points. (*Vide* Hornblow v. Fotheringham, 16th January, 1829, *post*. p. 352.)

ORPHAN CHAMBER v. EBDEN.

[14th January, 1829.]

1. *Wages,—for work done, what not sufficient proof to support an Action.*
2. *Oath of Reference,—when it is not competent to the Plaintiff to refer only a part of the case to the Defendant's Oath.*

Orphan
Chamber
v.
Ebden.

1. This action, was brought by the plaintiffs, as administering the estate, of the deceased R. Bell, and his widow, to recover payment from the defendant, of four months' wages, for work alleged to have been done by Bell, for the firm of Ebden & Watt, of which company, the defendant is the surviving partner.

The defendant pleaded, that he owed nothing, to Bell or his estate.

The plaintiffs, produced no evidence, in support of this claim, except a correspondence, between them and the defendant, before the action was commenced, in which the defendant had stated, "that Bell had been over-paid, for any services, which he rendered to Ebden & Watt," and contended, that these words, amounted to an admission, that the debt claimed, was once due, and consequently, that made it necessary for the defendant, to prove, that this debt had been discharged.

The *Court held*, that these words, had not the effect, contended for by the plaintiffs.

2. The plaintiffs then proposed, to refer to the defendant's oath, whether Bell, had not been in the service of Ebden & Watt, for a certain number of months, at a certain rate, but without referring, whether anything was now due, by Ebden & Watt, on that account, to Bell's estate.

The *Court held*, that the plaintiffs were not entitled, thus to refer only a part of the case, to the oath of the defendant, but allowed him, to refer the whole cause, to the defendant's oath, which the plaintiffs then did, and the defendant's oath being, that the debt claimed, was not owing, gave judgment, for the defendant, with costs.

Orphan
Chamber
v.
Ebden.

ROBERTSON v. THE SEQUESTRATOR.

[15th January, 1829.]

Sale.—A Bill of Sale of Moveables, without delivery, gives no "jus in re."

In this case, the *Court found*, that a bill of sale of moveables, without tradition of the moveables, conveys no *jus in re* in them to, and creates no lien over them, in favor of the buyer, and gives him nothing more, than a personal right of action, against the seller; and consequently, that the holder of the bill of sale, could not claim the moveables, which, while still in possession of the seller, had been attached by the Sequestrator, in execution of a sentence of the Court.*

Robertson
v.
Sequestrator.

EBDEN v. LIESCHING.

[15th January, 1829.]

Bills of Exchange,—Foreign, after sight, must, within a reasonable time, be presented for Acceptance, or put into circulation.

What reasonable time,—custom of the place, or circumstances of the case.

This action was brought, for payment of a bill of exchange, for £233 19s., dated 31st July, 1827, drawn by the defendant, in favor of the plaintiff, on R. W. Eaton, of London, at ninety days' sight, and which had been returned to the plaintiff, protested for non-payment, at the instance of Mount, who then held it, under a blank indorsation by the plaintiff.

Ebden
v.
Liesching.

* Cons. Grotius Int. 2: 5, § 12, and 2: 48 § 29, *ibiq.* Schorer in notis; Voet. 40: 1, 34; Leyser ad Pand. Spec. 444, n. 5; Burge Conf. of Laws, vol. 3, p. 493 *seqq.*—[Ed.]

Ebden
v.
Liesching.

The defence was, that the defendant, the drawer, had been discharged, by the *laches* of the holder, in not having caused the bill, to be *timeously* presented for acceptance.

The facts of the case, as to which there was no dispute, or which were proved, were, that the defendant had drawn this bill, against the proceeds of thirty pipes of wine, consigned by him to Eaton, per the *Olive Branch*, and had given the bills of lading, and letter of advice, to the plaintiff, to be by him transmitted to Eaton.

The *Olive Branch*, sailed from Table Bay, on the 12th August, and by her, the plaintiff had transmitted the bills of lading, and the letter of advice. The bill of exchange, was not transmitted from this colony, till the 7th November, 1827, when it was transmitted by the plaintiff, blank indorsed by him, in a letter addressed to Eaton, dated 7th November, per the *Borneo*, which arrived at Deal, on the 2d January, and in the London Docks on the 9th January, and the bill bore, to have been accepted by Eaton, on the 15th January, 1828.

Before the 18th April, when, according to the date of the acceptance, the bill became payable, Eaton had become insolvent.

This insolvency had not taken place, before the end of March, or beginning of April. Nine vessels had sailed from Table Bay for England, between the sailing of the *Olive Branch* and the *Borneo*.

By the *Borneo*, the plaintiff had written to Eaton, but this letter had not been entered in his letter book, and there was no evidence, as to its contents, given at the trial of the case.

The plaintiff called six respectable merchants, as witnesses, who proved, that in their practice, and in that of the colony generally, so far as they were acquainted with it, bills, drawn on England at so many days after sight, and even when drawn against the proceeds of a cargo, consigned to the drawer, were frequently kept by the payee or indorsee here, for a longer period, than three months, before being transmitted, and that it was necessary, for the negotiation of such bills, and the interests of commerce, as carried on in this colony, that the holder, should have the privilege of doing so, without losing his recourse on the drawer, and that they were aware, of no distinction made, between the effects of delay, in presentment for acceptance, occasioned, by the bills being kept here for a certain period, for the convenience of the holder, or by its being put into the circle, and sent home by the Mauritius and India.

The plaintiff also referred to Pothier *Traité sur les Contrats de Change*, pt. I., c. 4, § 25, and c. 5, § 1; Van der Linden, b. 4, c. 7, § 11, p. 686, Eng. ed.; Code de Commerce, art. 161; Chitty on Bills, p. 208, as to the law of

England ; and contended, that by the practice of the colony, keeping a bill, payable after sight, unnegotiated for three months, is no *laches*.

Ebden
v.
Liesching.

The defendant called no evidence, as to the practice.

The Court took time, to consider of their judgment.

The *Court held*, that by the law of Holland, and therefore of this colony, as well as of England, the principle is, that the holder of a foreign bill, payable after sight, must, within a reasonable time, either cause it to be presented, or put into circulation.

That what is *to be deemed a reasonable time*, will depend on the particular custom of the place, where the bill is drawn, if any custom is proved to exist ; if not, the question must be determined, according to the particular circumstances of each case.

But before the Court decided, whether in the circumstances of the colony, or of this particular case, as disclosed at the trial, the period of *three months was a reasonable time*, for the plaintiff, to have kept this bill in his possession,—(it was understood, that the Court were inclined, to hold that it was),—

Joubert, for the defendant, filed an affidavit of the defendant and others, stating, that on the 15th March, he had received a letter from Richard Buck, his agent in London, informing him, that he, the agent, had seen, in the possession of Mr. Eaton, the plaintiff's letter of the 7th November, 1827, to Mr. Eaton, inclosing the bill in question, in which the plaintiff stated, "*that though pressed for money, he had so long deferred sending forward the bill, fearing it might put him, Mr. Eaton, to inconvenience.*"

7th March,
1829.

The agent's letter, stated other circumstances, to which it is not necessary here to advert, which it was maintained by the defendant, were sufficient, to take this case out of the ordinary rule.

On this affidavit, the Court granted a rule *nisi* on the plaintiff, to show cause why, the Court should not suspend the delivery of their judgment, until the depositions of Eaton, Mount, and Buck, should be taken, on commission in London.

After hearing parties, this rule was made absolute.

The commission was issued, the depositions taken and returned, which proved that the plaintiff had written in the terms above quoted to Eaton, in his letter of the 7th November.

19th March,
1829.

Thereafter, upon hearing parties, and by consent, it was ordered, that this action be discontinued, and judgment entered for the defendant, the plaintiff consenting, to pay all costs incurred in this colony, to be taxed as between attorney and client.

1st June,
1830.

HORNBLow v. FOTHERINGHAM.

[16th Jan. and 15th Aug., 1829.]

Shipping,—Owner held liable, (by majority of Court,) towards the Master, to pay in Intermediate Port, for Repairs.

Survey of Ship,—when unnecessary.

Compensation,—of above Repairs, with Freight due by Master, as Charterer.

Arrest—of “*Peregrinus in Peregrinum Jurisdictionis fundandæ causâ*.”

Charter-party,—between two Englishmen, made in England and to terminate in Calcutta, whether cognisable by this Court.

Hornblow
v.
Fotheringham.

This action was brought by the plaintiff, to recover from the defendant, £165 2s. 8d., alleged to have been paid, laid out, and expended by the plaintiff, on account of the defendant, managing owner, of the ship *Rockingham*, for absolute and needful repairs done and performed, necessaries, furnished and supplied, port-charges, and other disbursements in Table Bay, in order to facilitate, and enable the said ship, to proceed on her voyage to Calcutta.

The facts of this case, were as follows :

By a charter-party, dated 10th April, 1828, the plaintiff agreed to take, and the defendant, who was the managing owner of the ship, to let the ship *Rockingham*, in full right to the plaintiff, for a voyage from London, to Madras and Calcutta, with liberty to go into the Cape. The owner, to find the ship in proper and sufficient stores, and crew as customary, for the said voyage, (exclusive of a surgeon,) and sufficient good water and fuel, for the passengers, and stock, also, what salt provisions, passengers may require. The owner, to pay all port-charges and expense, of fuel and water, for crew and passengers. In consideration of which, the owners are to receive £2000, payable one-third a month from said date, one-third on ship's sailing from Gravesend, and one-third by an approved bill, payable three months, after the sailing of the ship. The plaintiff to command the ship, *in full authority*, without pay or emolument. The defendant *to have the privilege, of going as passenger in the ship. The plaintiff to have and to hold, the possession of the register, and all the ship's papers, for legal purposes, as Captain of said ship*, until the termination of the aforesaid voyage out. The plaintiff to deliver over, the command of the ship, after delivery of

her cargo at Calcutta, or as much earlier as possible. *The owners giving a full discharge, for all claims upon the charterer.* Hornblow
v.
Fotheringham.

Richardson, Ireland & Co., to be guarantee.

The owners, to be allowed, to put in goods, not exceeding 30 tons freight, &c., &c.

(Signed)

A. FOTHERINGHAM.

W. HORNBLow.

RICHARDSON, IRELAND & Co.

The ship sailed, and put into Plymouth, the defendant going as passenger in her; there the plaintiff wrote to the defendant:—

“Sir,—I have ordered fresh provisions for the ship’s company, and wish to know, whether I am to address the bill, to Mr. Backwick, or to yourself, for payment.

(Signed)

“W. HORNBLow.”

To which the defendant replied:—

“Sir,—I will settle the bill, for the fresh provisions, for the crew.

(Signed)

“A. FOTHERINGHAM.”

And the defendant, did settle this bill.

On the ship’s arrival at Madeira, the foretop-mast rigging was condemned and replaced. It was alleged, and not denied, that this repair, was paid for by the defendant.

It was proved, that the ship was found to labour under defects, that made it necessary, to take her to St. Salvador for repairs.

No survey was made, but the ship was repaired, and it was proved by Jack, the first officer, that the repairs there, were made under the superintendence of the defendant, who gave the directions to the carpenters, and saw personally all that was done, that every thing, was done entirely, by the defendant’s directions, and that the plaintiff told Jack, “that he had given the owner, the preference of superintending the repairs, in order, not to put him to the expense of a survey.”

At St. Salvador, the defendant wrote to the plaintiff,—

“2d September, 1828.

“Sir,—I shall order such repairs, as I find necessary, when the ship is inspected; should you think, they are not sufficient, you have your remedy, in all other matters, you are commander, and know best how to act. I wish not, to interfere with any business of the ship, except what I consider strictly, belongs to the owner. I was induced, to offer my superintendence, in order that the ship, should not be detained.

(Signed)

“A. FOTHERINGHAM.”

Hornblow
v.
Fotheringham.

On the 10th September, while still at St. Salvador, the plaintiff wrote to the defendant,—

“Sir,—Finding that you have declined, to settle with Mr. Yond, for the disbursements, for the ship *Rockingham*, at this port, I have to inform you, *that it is my intention, to pay him* the full amount of the same, including the expense of work, done under your personal superintendence, in caulking, &c. It is perfectly obvious, that the ship must be liable, to the usual port-charges, nor has any other expense, been incurred here, that, to my knowledge, can be liable to cavil. *However, unless you should condescend, to pay the whole of the ship's disbursements yourself, I MUST DECLINE YOUR ASSISTANCE ALTOGETHER, and settle them myself.*

(Signed)

“W. HORNBLow.”

It was proved, that the defendant then paid for the repairs at St. Salvador, and from nothing having been said at the trial by either party, as to the other disbursements, it is to be presumed, that the defendant paid for the whole of the disbursements, at that port.

It was proved, that on her voyage, from St. Salvador to Table Bay, the ship was found to labour under such defects, as made it necessary, that she should undergo repair at this port.

It was proved, that the plaintiff caused a survey to be made of the ship here, on the 27th September, by four persons, indisputably competent to the task, attended by a notary public. This survey was made, without the defendant's knowledge, or concurrence.

It was proved, particularly by the evidence of Renton, the ship's carpenter, that after this survey, certain repairs were made, and that the defendant, for the first one or two days, superintended them, when, having ordered a defect, to be repaired, in a manner which the plaintiff, the carpenter, and other witnesses, thought, to be an improper one, and been informed that the plaintiff would not have the work done so, the defendant ceased, to give any further orders, about the repairs, or to superintend them.

After the repairs, the expense of which was £76 15s. 2d., were finished, the plaintiff caused a second survey, to be held on the ship, without the defendant's knowledge or concurrence.

On the 24th October, the defendant wrote to the plaintiff:

“Sir,—As I have not either agent, funds, or even a letter, to any person at this place, neither do I know, what quantity of provisions, or water may be required for the ship *Rockingham*, you can supply more articles, and charge them in account.

(Signed)

“A. FOTHERINGHAM.”

The expense of the repairs, and other disbursements for the ship, for which, by the terms of the charter-party, the owners were to be liable, including the expense, of the two surveys, and amounting with their charge, for commission, to the sum of £165 2s. 8d., claimed in this action, were paid by Thomson & Watson, who had been employed by the plaintiff, as agents for the ship. Hornblow
v.
Fotheringham.

The plaintiff transmitted their account to the defendant, for payment, on which the defendant wrote to the plaintiff,—

“6th November, 1828.

“Sir,—In acknowledging the receipt, of your letter of this date, handing Messrs. Thomson & Watson’s account, for port-charges and disbursements, I beg to refer you to my letter of the 24th ultimo, wherein I informed you, that you could supply the necessary water and provisions, required for the ship, and charge the same to account, which I now confirm, together with port-charges, but protest, against the charges of surveys, in the account now before me, as being held without my sanction, and what I consider, to have been altogether unnecessary.

(Signed)

“A. FOTHERINGHAM.”

On the 8th November, 1828, the defendant wrote to the plaintiff’s attorney,—

“Sir,—In answer to your letter, I beg to refer you to mine of yesterday, wherein I state, that I consider myself not liable for repairs and disbursements, for the ship *Rockingham*, at this place, that has been ordered, by Capt. Hornblow, the charterer of the vessel. I, in consequence, shall decline coming under any engagements, for debts contracted by him here. I beg to add, I shall hold Capt. Hornblow liable, for the detention of the ship.

(Signed)

“A. FOTHERINGHAM.”

On the 10th November, the plaintiff settled the account with Thomson & Watson, who gave him the receipt subjoined thereto :—

“Received the above amount, of Rds. 2208 3 sk. 4 st., in account, with Capt. Hornblow.

(Signed)

“THOMSON & WATSON.”

On the 11th November, the plaintiff took out a writ against the defendant, as managing owner of the ship *Rockingham*, under the 8th Rule of Court, and the defendant was arrested, and held to bail, to answer this action. The affidavit of the plaintiff, on which the writ was issued, after stating, how the plaintiff’s claim arose, proceeded thus :—

“And this deponent further saith, that he hath not any mortgage, pledge, or security for, his said demand, and that the said sum, of £165 12s. 8½d., remains wholly unsecured

Hornblow *to this deponent, and that he hath caused, application to be*
 v. *made, to the said A. Fotheringham, for payment thereof, but*
 Fotheringham. *which he has most positively declined. And lastly, that the*
said A. Fotheringham, arrived in this colony, as a passenger
on board the said ship, and INTENDS TO PROCEED THERE-
WITH TO CALCUTTA. THAT THE DEPONENT, HAS GIVEN NOTICE
OF HIS INTENTION, TO SAIL WITH THE SAID SHIP, ON THIS OR
THE FOLLOWING DAY."

The plaintiff's declaration set forth, the material facts above detailed.

In his plea, the defendant denied the plaintiff's right, to maintain this action against him,—

"Because by the said charter-party, the said defendant has not accompanied the said ship, in his capacity as owner, but merely and solely as a passenger,—and the said plaintiff, being the charterer, and in possession of the ship's register, was both able and bound, to provide for the necessary outlays of the ship; and the said defendant denies, that the said charter-party, or any part thereof, can be construed, so, as to make the defendant liable, to pay any disbursements, made by the said charterer, at the port or ports, where the said ship may happen to be; and says, that the said plaintiff, has always acknowledged, that the defendant was not liable, to advance such moneys, at intermediate ports, as most clearly appears, in the letters hereunto annexed, marked Nos. 1 and 2, (those quoted above, dated Plymouth, 22d June, 1828, and St. Salvador, 10th September, 1828,) and that therefore, if the defendant has done so, it has been at the request, and for the accommodation of the plaintiff, and not from any right or title, which the plaintiff had, to demand, that the defendant should do so; and moreover, that the plaintiff, before and at the suing forth, the original writ of the said plaintiff, against the said defendant, was and still is indebted to the said defendant, in a large sum of money, to wit £666 13s. 4d., for the second instalment, of the hire of the said ship *Rockingham*, which ought to have been paid, on the said ship's sailing from Gravesend, but which has not been done,—and £666 13s. 4d., for which the said plaintiff undertook, to give an approved bill, payable three months after the sailing of the said ship; and the said defendant further says, that the said several sums of money, so due and owing to him, as aforesaid, exceed the damages, which the plaintiff maintains, to have sustained, &c., and therefore, the defendant denies, that the plaintiff is entitled to his claim of damages, &c., &c., and alleges, on the contrary, that such claim, (if any exists) should be taken, and brought into account, as a set off, at a final settlement, after the expiration of the charter-party, and this the defendant is ready to verify, &c. Wherefore," &c., &c.

In his replication, the plaintiff denied, the sufficiency of the defendant's pleas, "because he says, that the defendant, was liable, and did consider himself liable, to advance such moneys, as in the said declaration and plea mentioned, at intermediate ports, as appears by the letter at Plymouth, hereto annexed, &c., (the defendant's letter of 22d June, 1828,) in answer to the letter annexed, &c.; (the plaintiff's letter of 22d June, 1828;) and, because the plaintiff (protesting, that the defendant cannot set up such claim, in reconvention, as by him above is pleaded,) says, that he was not, nor is he indebted to the defendant in manner, &c., &c., as alleged," &c.

Hornblow
v.
Fotheringham.

At the trial, the defendant admitted, the repairs to have been necessary, and that the charges for them, and the other disbursements, except the surveys, and the charge for the notary attending at them, were fair and reasonable.

16th January,
1829.

The *majority* of the *Court* held, that all the defendant's pleas in defence, against the claim of the plaintiff, except in so far, as regarded the expense of the second survey, were ill-founded; and gave judgment for the plaintiff, with interest *a tempore moræ*, and costs; with allowance of the charges, for the first survey only, and of the notary thereon, subject to taxation by the master. Thereafter, upon the master's taxation, judgment for £139 11s. 6d., with interest and costs.

15th August,
1829.

Menzies, J., was of opinion, that judgment ought to have been given for the defendant, with costs, on the following grounds:—

1st. He held, that the plaintiff's claim, can only arise out of, and can have no other foundation, than the *charter-party*. That the charter-party, was a contract, made in England, between two Englishmen, stipulating, that it was to commence in England, and to terminate at Calcutta, where the law of England is in force; that England and Calcutta, were the only *loca solutionis* contemplated in the contract. That this contract, must therefore be deemed, to be an English contract, and must be construed, and given effect to, according to the law of England, and not of this colony. That this contract, ought, in the first instance, to be considered, as if it had not contained, the words, "Capt. Fotheringham, to have the privilege of going as passenger," leaving the effect, of these words, if any, for after consideration.

2dly. That this contract, proves, that the defendant, was one of the owners, and the managing owner of the *Rockingham*, and entered into the contract, in that capacity, and consequently, that he may be sued, in any competent Court, by the other party to the contract, to perform, *in solidum*, every obligation, arising out of the contract, at the place where, and at the time when, according to the true meaning of the contract, as explained by the English law, such obligation should

Hornblow
v.
Fotheringham. be prestable (*vide* Abbot on Shipping, p. 82). That this contract, bestows, on the plaintiff, all the rights, belonging to the charterer of the ship, and imposes on the defendant, and the other owners, all the liabilities to the charterer, which by English law, are incumbent, on the owners of a chartered vessel.

3dly. That this contract, invests the plaintiff, with the character of master of the ship, bestows on him, every right, privilege, and power, and every claim against the owners,—and imposes on him, every obligation and duty, which the law of England, has bestowed or imposed, on the masters of ships.

That the provision of the contract, that the plaintiff was to deliver over, the command of the ship, at *Calcutta*, the owners giving a full discharge, for all claims, upon the charterer, bestows on the plaintiff, such a power of retaining the possession of the ship, for a time, as, but for this provision, he would not, *as master*, have possessed, by the law of England.

That the union, of the character of charterer, with that of master of the vessel, does not deprive the plaintiff of any of the rights, privileges, or powers, or of any claim, against the owners, or relieve him, or the owners, from any of the obligations, in which they would, in the characters of master and owners, have been respectively liable to each other, if the plaintiff had been only the master, and not also the charterer of the vessel.

That by the law of England, the plaintiff, *as master* of the ship, could not legally have demanded, before the ship sailed, that the defendant should furnish him with funds, or with bills, or letters of credit, to enable him to procure funds, to pay for repairs of the ship, and other necessary disbursements, at every intermediate port, at which the contract contemplated, that the ship might touch, much less, at any other port, into which unforeseen events, might compel her to go. It would have been a sufficient defence against this demand, for the defendant to say, “the contract, between you as master, and me as owner, does not, by the law of England, oblige me, to provide you before hand, either with the funds, or the means of credit, which you demand; because, as the amount of expense, which unforeseen events may occasion, or the places where the expenditure may be required, cannot possibly be ascertained before hand, it is almost, if not wholly, impossible to do so; and because, it is unnecessary, for the purposes of the contract, that the owners, should be put to the inconvenience, of complying with such a demand, seeing, that the law of England, founded on reasons of obvious expediency, and on long established usage, has authorised, and provided certain means, by which, as master, with perfect safety to yourself, you can procure funds, for the necessary disbursements

of the ship, at any port, and because by appointing you, master of the ship, with full authority, and entrusting you with the ship's register, and all the ship's papers, to be used by you, for legal purposes, you have been enabled, to avail yourself of those means recognised by law, for such purposes (*vide* Abbot, p. 107, 108). If, as master, you are able, and choose, to provide funds of your own, for such expenses, you have the right, to draw bills on us, for, or to demand from us *in England*, repayment of, what you have advanced, or you may retain it, out of the freight which may come into your hands, and in this case, out of the freight, which as charterer you ought to have paid, at this time, and have not paid. If not, you may bind the owners personally, for the amount of the disbursements, or for the money advanced to you, to make them, or, if you cannot obtain funds, on our personal credit, you may pledge, both the ship and our personal credit (*vide* Abbot 101, § 3; 107, § 7; 125, 127). Or, lastly, you may hypothecate the ship, by a bottomry bond. (Abbot 112, 124.) When you contracted, to become master, you ought to have known, that you thereby, undertook the obligation, of causing necessary repairs, &c., to be made at foreign ports, and that the different modes of proceeding, just mentioned, are the only means, which the law has provided for you, to enable you, to pay for such repairs," &c.

"You must either now sail, and perform your contract as master, or you will be liable to us, in damages, for breach of contract."

He held, that if, as has been shown, the plaintiff could not compel the defendant, before the ship sailed from England, to provide him with funds, or credit, to enable him to make these disbursements, for the ship, *the necessity of which, to some amount or another*, must have been contemplated by the parties, when they entered into the contract, and could only have recourse in order to obtain funds, for such disbursements, to the means above mentioned, as having been provided by law, for this purpose, and look for a settlement with the defendant on this account, only either in England or in Calcutta, the fact, of the defendant, the managing owner, happening accidentally to be, or to have arrived in another ship, at the foreign or intermediate port, at which the *Rockingham* was lying, for the purpose of being repaired, or taking in supplies, provided the defendant did not interfere, with any act done by the plaintiff, as master, and did not attempt, to prevent the plaintiff from providing for the ship's disbursements, in any way, which would have been competent to him, if the managing owner, had not been present at that port, could not alter, the nature or stipulations of the contract, in which England or Calcutta only, are stipulated, to be the *locu solutionis*,

Hornblow
v.
Fotheringham.

Hornblow
v.
Fotheringham.

or settlement, between the parties, or to make the owner personally liable, to provide funds, for such disbursements, at a port, at which, if he had not happened accidentally to be present, when the *Rockingham* was lying there, he would not have been liable, to provide such funds.

A contrary decision, would have the effect, of compelling the defendant, in consequence of an event, not contemplated in the contract, to perform the obligations of the contract, at a time and place, when and where, he had never intended, much less stipulated, that any of the obligations of the contract, should be performed.

The case would be different, if the defendant's presence in Table Bay, had prevented the plaintiff, from having recourse, to the means, of providing funds for the ship's disbursements, which he would have possessed, in the defendant's absence. He had the power, of borrowing money on bottomry, although the defendant was in Table Bay. (Abbot 123, § 25.)

The case might be different, if the defendant had interfered with the plaintiff, in providing what was necessary for the ship, or superseded the plaintiff's authority as master, in which case, the defendant might have been deemed, to have discharged the plaintiff, from his obligation, to do which, but for such supersession and interference, he would have been bound to; and to have rendered the defendant personally liable for disbursements, which he had personally ordered. But, it has been proved, that the defendant neither attempted to supersede or oppose the plaintiff's authority, as master, or to interfere with his acts.

He held, that whatever effect, might have been given, to a provision in the contract, expressly stipulating, that the defendant, as managing owner, should go in the ship, during the whole voyage, which was the subject of the charter-party, on the ground, that by inserting such a stipulation in the contract, the parties might be deemed to have contracted, that the managing owner, should accompany the ship, for the purpose of providing the repairs and supplies, that might be necessary, yet, that there was no such stipulation in the contract, and that the clause, providing that the defendant "should have the *privilege*, of going in the ship as a passenger," was not equivalent, to such an express stipulation, seeing, that it imposed no obligation whatever, on the defendant to go in the ship, in which he need not have embarked at all, or which he might have left at Madeira, or St. Salvador, without contravening the contract; and that the plaintiff could not legitimately maintain, that he entered into the contract, on the faith, that the defendant would do that, which the contract left entirely to the defendant's option to do, or not, as he thought fit.

Consequently, that the contract must be construed, exactly in the same way, in which it ought to have been, if it had not contained that clause. Hornblow
v.
Fotheringham.

He held, that this Court, could not sustain the plaintiff's present claim, unless they were prepared, to decide, that if the defendant had had no funds or credit, at Madeira or St. Salvador, the plaintiff, although as master of the ship, and in possession of all the papers, to be used for legal purposes, he had legal means of himself providing funds for the ship's disbursements, might have refused, to avail himself of these means, and have sued the defendant, before the foreign Courts at Funchal or St. Salvador, for instant payment of the disbursements, made by the plaintiff for the ship, and in the event of the defendant's inability, to procure funds or credit there, to have incarcerated him, and left him to rot, in the prisons of either of those foreign countries.

He held, that in the decision of this case, it was necessary, not to confound the plaintiff's character, as *charterer of the vessel*, with *his character as master of the ship*. And admitting, but merely for the sake of argument, that, if the defendant had failed himself, to provide the funds, or to enable the master of the ship, to provide the funds, required to pay for repairs and supplies, without which, the *Rockingham* could not accomplish her voyage, from Table Bay to Calcutta, the plaintiff might, if he had found the defendant, accidentally in this colony, have sued him, either to provide the funds necessary, to enable the ship to complete the voyage, contracted for, or for damages for failing so to do, in this Court, instead of in England or Calcutta, the places contemplated in the contract, as the *loci solutionis*, and of the settlement of accounts, between the parties. He held, that nevertheless, if the plaintiff, were now to be deemed, to have brought this action, as *the charterer*, and not as the *master* of the vessel, it would, under the circumstance of this case, be a sufficient defence for the defendant, to plead, that he had already done every thing, which the law requires the owner of a vessel to do, in order, that she may receive in an intermediate port, the repairs, which in the course of the voyage, have become necessary, to enable her to complete it, by appointing a master, completely under the charterer's control, viz., the charterer himself, and invested this master, with all the powers, and placed under his exclusive custody and control, all the papers necessary, to enable him to procure funds, to make the disbursements, required to enable the vessel, to complete the voyage, for which she was chartered; and as by his appointment, to, and acceptance of the office of master, the charterer has become vested, with all the powers, and liable, to perform all the duties of master, he is not entitled to sue the defendant,

Hornblow
v.
Fotheringham, to do that, which, as master, he himself has been furnished, by the defendant, with sufficient means of doing, and which, as master, it was his duty to do.

He held, that it was impossible, to consider the action, as having been brought, by the charterer, to compel the owners, to have the vessel made fit for the voyage, for which she was chartered. In point of fact, the vessel had been rendered fit, for this voyage, before the action was commenced. And, it cannot in law be considered, or given effect to, in any other character, than as an action, brought by the plaintiff, as master of the ship, to compel the defendant *here*, to pay the expense, of certain repairs, which by virtue of his authority, as master, the plaintiff has caused to be made, and for which, he has already procured the means of paying, notwithstanding, that the defendant neither by the express provisions of the contract, or by the intendment of law, undertook to furnish the plaintiff in this colony, with funds, for this purpose, in any other way, than by furnishing him with all the ordinary means, which by law and custom, are given to masters, to enable them to procure funds, for disbursements in intermediate ports, which, by becoming master, the plaintiff necessarily undertook, to use for this purpose, and which he has not even alleged, much less proved, to have been found to be insufficient, to procure the necessary funds.

He held, that the correspondence, and conduct of the parties, since the ship sailed from Gravesend, prove, that they understood, and acted on the contract, according to the construction, which has been above put on it.

The Plymouth letter, proves, that the plaintiff ordered the provisions, without having consulted the defendant, or received his instructions, relative thereto, and that the plaintiff, did not look to the defendant, as the person, by whom they ought to have been paid.

The plaintiff's letter, of the 10th September, at St. Salvador, expressly states, that unless the defendant should *condescend*, to pay the whole of the disbursements himself, the plaintiff must decline *his assistance*, and settle them *himself*.

These letters, and the evidence of Jack, and Renton, prove, that both parties, considered, that the plaintiff, as master, had the sole control, as to what repairs and supplies, should be made and furnished, and that the only interference, which the defendant had in these matters, was *by tolerance* of the plaintiff, as master of the ship.

The fact, that the defendant did pay for the repairs and supplies, at Plymouth, Madeira, and St. Salvador, affords no proof, that he admitted, or considered, he was bound to do so *there* ; his doing so, can easily be accounted for, by his knowledge, that he would ultimately be obliged, to repay the amount

of these disbursements, and by its suiting his convenience, to make these payments, with the means which he had at his command on the spot, rather than to provide in England, for bills, drawn there on England, or, than to have had the ship hypothecated, for them by the master, by the expensive process, of a bottomry bond.

Hornblow
v.
Fotheringham.

The conduct of the plaintiff, both at St. Salvador, and here, as to the repairs, is a complete answer, to the argument, which has been used on his behalf, that although the effect of the provisions in the contract, was to deprive the defendant while on board the ship, of the character of managing owner, and render him a mere passenger, without any right of interfering with, or controlling the management of the ship, yet the instant he landed at any port, where the ship lay, he became instantly liable, to perform all the duties and obligations, incumbent on the managing owner. If, on landing, he became liable to those duties and obligations, he must also thereby have been entitled, to resume all the powers and authorities, of a managing owner, and *inter alia*, that of regulating and controlling the ship's repairs and supplies; but it is proved, that the plaintiff asserted, and that the defendant admitted, that he, the defendant, had no right, to exercise any such power or control.

On these grounds, he held, that the defendant was entitled, to judgment with costs.

4thly. He held, that even, if the plaintiff were, under the contract, entitled, to demand payment of the sum claimed, in this colony, yet, that, as the contract proves, that the plaintiff was bound, to have paid, the second instalment, of the freight, £666 13s. 4d., and to have given an approved bill, for the third instalment, of the £666 13s. 4d. on the sailing of the ship, and as the defendant has denied, that the plaintiff has done so, the defendant is entitled to plead, that the plaintiff is not entitled, to sue him for the performance, of his part of the contract, unless he can show, that he, the plaintiff, has performed that part of the contract, which it was incumbent on him to perform, on the sailing of the ship; and which the plaintiff, has not shown, or even expressly alleged, that he has done.

If the plaintiff has performed his part, and cannot now prove he has done so, it is his own fault; he ought not to have brought this action, to compel the defendant, to perform his contract, in a Court, where he, the plaintiff, was not able to prove, that he had performed his own part.

5thly. He held, that even, although that the question of compensation, or *set off*, if pleaded against the plaintiff's personal claim, ought to be decided by the law of England, and that by that law, the defendant could not compensate, or

Hornblow
v.
Fotheringham.

set off his claim, for freight, against, and with the effect of extinguishing the plaintiff's present claim, supposing the latter to be just and well founded,—yet, that as the plaintiff's present claim, and that of the defendant, for freight, arise out of the same contract and transaction, with reference to which a settlement of accounts must take place, between the parties at the end of the voyage, when the contract terminates; he held, that the defendant was entitled, to retain the amount of the plaintiff's claim, as it should now be ascertained, and constituted, by the judgment of this Court, in order that, as claimed in the defendant's plea, "it may be taken and brought into account, as a set off, at the final settlement, after the expiration of the charter-party."

6thly. He held, that the second survey, was altogether unnecessary, and improper, and that considering, that the ship's defects were so trifling, as to be repaired at the expense of £76, the opinion of any one, of the four surveyors, who had been employed, in conjunction with that of the captain, officers, and carpenter of the ship, would have been a sufficient warrant, to entitle the plaintiff, to cause the repairs to be made, and consequently that a very considerable deduction, should be made, from the amount claimed as the expense of the first survey.

7thly. In conclusion, he observed, that another question, might have been raised, between the parties, namely, whether the plaintiff was entitled to have the arrest, under which the defendant had been held to bail, declared valid, or the defendant to plead, the nullity of the arrest, and to have it removed.

He held it to be a very important question, and one, to say the least, attended with very great doubt, whether, in the case of a contract, made between two Englishmen in England, which was to commence in England, and terminate at Calcutta, a place under the law of England, to which place, it was contemplated, in the contract, that both the parties should proceed in the same ship, and to which the plaintiff, in the affidavit, on which he obtained the writ of arrest, has sworn, that the defendant intends to proceed, in the same ship, with the plaintiff,—it is competent for the plaintiff, by means of the process of personal arrest, (an *extraordinary* remedy, given by the law of this colony, only in particular cases,) to compel the defendant, in answer to any claim, alleged by the plaintiff, to have arisen out of that contract, in the Court of this colony, which, as to this question, must be considered a *foreign country*, at one of the ports of which, the ship, containing the two parties, has accidentally happened to touch, for a few days, and which Court, is therefore neither the *forum originis vel domicilii*, of either of the parties, nor the *forum*

loci contractus vel loci solutionis, where both the parties, have the same *commune forum*, and are actually proceeding to it, in the same ship, and where there is no allegation by the plaintiff of the existence of any intention, on the part of the defendant, to do any thing, by which the plaintiff may be defrauded, or defeated, in the recovery, of any debt, due to him by the defendant, or to evade the jurisdiction of the *forum*, to which they were both subject, to prevent the accomplishment of which intention, the summary interference of this Court is necessary. (*Vide* Van der Linden's Institutes, b. 3, pt. I., c. 4, § 2, p. 431; Voet 2: 4, 18-23, 26, 35, 45; 1: 21, and 5: 1, 66; and the case of Bernard v. Connor and others, decided in the Court of Session in Scotland, 11th June, 1811, Fac. Coll. p. 275.)

Hornblow
v.
Fotheringham.

It is true, that *actor sequitur forum rei*, and that in many cases, by means of an arrest of the defendant's person *jurisdictionis fundandæ causâ*, the Court issuing the arrest, although previously not the proper *forum rei*, may become a *forum*, in which he can be sued, in virtue of the jurisdiction, which it has acquired over him, by attaching his person by its arrest. But the question here, is not, whether, a Court may not in certain cases, by means of its process of arrest, create a jurisdiction, over a defendant, of whom otherwise, it was not the *forum competens*; but whether this Court, whenever applied to, by any *peregrinus*, alleging a claim against any other *peregrinus*, is bound, in every case, and without regard to the circumstances, in which the parties are placed, to use its process of arrest, in order to create a jurisdiction to itself, over a person, of or over whom, otherwise, it would not have been the legal *forum*, or have had civil jurisdiction, and if not, whether the circumstances of this case, are such, as to warrant the Court, in doing so in this instance.

This question, as to the competency or validity of the arrest, and the consequent jurisdiction of this Court, has, however, not been raised, by the defendant, in this case, who has, as the defendant also did in *Hill v. Wallace*, 13th January, 1829, *supra* p. 347, chosen, to submit to the jurisdiction of this Court, without objection; and it must therefore be distinctly understood, that neither by the proceedings, nor the judgment of this Court, in this case, and that of *Hill v. Wallace*, has this question been finally decided, much less, decided in favour of the validity of arrests, at the instance of one *peregrinus* against another *peregrinus*, under similar circumstances.

MURRAY, APPELLANT, v. DE VILLIERS, RESPONDENT.

[17th March, 1829.]

1. *Sale of Wine, Purchaser, whether "in mora," for not ascertaining the quality before delivery of the whole quantity is completed.*
2. *"Onus probandi" of quality—bad or good, on whom rests.*
- 3, 4, & 5. *"Actio redhibitoria"—pleadable, if part of bad quality.*
6. *Who liable for Cellar Rent of Wine "pendente lite."*

Murray, ap-
pellant,
v.
De Villiers,
respondent.

The appellant Murray, by a written agreement, had bought from the respondent De Villiers, fifty pipes of *good Cape Madeira*, viz., twenty of vintage 1821, and thirty of 1822, for a certain price therein specified. It was stipulated, that Murray should keep the casks, in which the wine was to be delivered, and on receipt of the wines, give De Villiers a like quantity of packs of pipe staves, with hoops and nails, and pay Rds. 7 for the expense of putting up each pipe.

Forty-four pipes of Cape wine were delivered by De Villiers to Murray, in September, October, November, and December.

By the account rendered by De Villiers, the last twenty-four pipes were stated to have been delivered, on the 10th December, 1823.

Murray did not deliver to De Villiers, the pipe staves, on receipt of the wine.

On the 29th January, 1824, the respondent caused an insinuation to be served on the appellant, setting forth the agreement between them, that the appellant had received the twenty pipes of vintage 1821, and twenty-four *only* of vintage 1822, "on account, as by him (Murray) stated, of his stores being too full, to hold the remaining six," and requiring the appellant, to deliver the pipe staves, &c. &c., as per agreement.

To this insinuation, the appellant returned the following answer:

"I do not intend to keep those pipes. The whole of the wines delivered by Mr. De Villiers, have been this day tasted and examined, by Messrs. Collison, Willenburg, Isles, and Whiston, and are found not to agree, with the terms of the contract, and they are now lying at the risk of Mr. De Villiers.

(Signed) "JOHN MURRAY.

"29th January, 1824."

An action was thereafter instituted by the respondent, for delivery of the forty-four packs pipe staves, &c., at Rds. 7 per pack; and another action, for the contract price of the wines, after the term of payment stipulated in the contract.

The appellant's defence was, that the respondent, having failed to perform the stipulations of the contract, by delivering wine, *which was not good Cape Madeira*, could not insist on his, the appellant, performing his part of the contract; and in reconvention the appellant claimed store rent for the wine, from the 29th January, 1824.

Murray, ap-
pellant,
v.
De Villiers,
respondent.

On the 16th September, 1826, the late Court of Justice, gave judgment against the appellant in both actions, and absolved the respondent from the appellant's claim in reconvention.

Against this judgment, the appellant appealed.

After hearing parties, the *Court* were of *opinion*:

1. First: That the appellant was not *in mora*, in not having ascertained the quality of the wine, delivered prior to the 29th January, 1824, because the delivery of the whole fifty pipes purchased, had not been completed before that date.

2d: That although under the circumstances of the case, the performance of the contract, in so far as related to the *delivery* of the wine, should be deemed to have been completed, on the 10th December, 1823, when the last twenty-four pipes were delivered, yet, that the appellant, by delaying to ascertain the quality of the wine, before the 29th January, 1824, was not in *such mora* as to raise against him a *presumptio juris* and *de jure*, that the wine was of good and proper quality at the time when it was delivered and received, —although *such*, as to throw on appellant the *onus probandi*, that the wine was bad when delivered, and had not been deteriorated after the delivery.

3d: That it had been proved, by the evidence in the case, that more than a half of the wine, at the time it was delivered, was not "good Cape Madeira" but wine of a bad and inferior description.

4th: And consequently, that the appellant would have been entitled, by means of the *actio redhibitoria*, to set aside the contract *altogether*, and not merely to reject the bad portion.

5th: That the appellant was entitled, to plead in defence against this action, those facts, which would have been sufficient, to found the *actio redhibitoria* at his instance, against the respondent, and having fully proved these facts, had established his defence, and was entitled to judgment in his favor, with costs.

6th: That as the respondent had rejected the proposal, formally made to him by the appellant in 1824, for the disposal of the wine, *pendente lite*, the appellant could do nothing else, than continue to keep the wine in his cellar: and as the appellant has proved, that he was in consequence prevented, from letting his cellar, on a lease for two years at Rds. 50 per

Murray, ap-
pellant,
v.
De Villiers,
respondent.

month, he is entitled to that sum, and such further sum, as shall be a reasonable rent for the cellar, during the rest of the time.

The Court therefore gave judgment, reversing the two sentences appealed against, with costs; and finding the appellant entitled to cellar rent, from the date of the proposal in 1824, for two years at Rds. 50 per month, and for the rest of the period, at such rate, as shall be ascertained by the Master, to be fair and reasonable.

IN RE LOLLY.

COMMISSARIES OF VENDUE v. SEQUESTRATOR.

[19th March, 1829.]

Hypothec of Fisc. on Estate of Pachter.

Preference of Vendue Commissioner by Instructions of 1793—refused.

In Re Lolly.
Commissaries
of Vendue
v.
Sequestrator.

Lolly was the Government pachter for the retail of wine and spirits. While he held this situation, he purchased certain goods at a vendue sale;—within six months after this purchase, he became insolvent, and his estate was placed under sequestration;—the goods purchased by him as aforesaid, were then in his possession, and were sold by the Sequestrator. When he became insolvent, he was indebted to Government, on account of the pacht payable by him. The then Sequestrator Reitz, ranked the commissioners of vendue, as preferent creditors on the proceeds of the above mentioned goods, before the claim of the Government for the pacht.

The commissioners' claim of preference, was founded not merely, on the unpromulgated vendue regulations, issued by Lord Caledon, (*vide supra* Commissioners of Vendue v. Brink, 31st December, 1828, *supra* p. 340,) but on the previously existing instructions and regulations for the vendue master, of 1793, which had been duly promulgated, when they were issued. The Fiscal, by letter to the Sequestrator, admitted on the part of Government, that the commissioners were entitled to this preference.

On the 16th January, 1824, the late Court of Justice, confirmed the Sequestrator's plan of distribution.

Paton and others, sureties for Lolly to Government, for the pacht, appealed against this sentence.

The Government was no party to this appeal.

On the 5th September, 1826, the late Court of Appeal, reversed the sentence of the 16th June, 1824, and decreed:

"the demand of Government, for the pacht money in arrear by Lolly, to have a preferential claim, over that of the Burgher Senate,—the Lawyers,—the Sequestrator,—and the Vendue Masters,—and of J. R. Thomson, as anterior thereto; and doth direct the Sequestrator, to distribute and liquidate the said estate, in the manner now amended," &c.

In Re Lolly.
Commissaries
of Vendue
v.
Sequestrator.

A new plan of distribution, was, in accordance with this sentence, made by the then Sequestrator Kuys, who presented it for confirmation to the Court of Appeals, who refused to receive it;—Kuys then applied to the late Court of Justice, who referred the plan to the Court of Appeals.

After this, nothing was done with respect to it, prior to the 1st January, 1828, when the Supreme Court came, in place of both the late Courts. On the motion of Joubert, for the Commissioners of Vendues, the Court directed the plan of distribution, confirmed by the sentence of the 16th June, 1824, to be submitted to the Master, and to lie open in his office, until the 6th day of next term, for consideration of the creditors, when it would be confirmed, unless cause should be shown to the contrary, reserving to Paton and the other sureties, all such effect in their favor as may arise out of, or belong to the sentence of the Court of Appeals, dated 5th Oct., 1826.

Postea.—The Master having reported, that none of the creditors, had filed any objection thereto, the Court ordered, that the said plan of distribution be formally decreed and confirmed.

8th Septem.,
1829.

DISCOUNT BANK v. HEIRS OF CROUS.

[30th March, 1829.]

Promissory Note,—for accommodation of Endorser,—want of notice to Endorser, of non-payment by Maker, will not discharge Endorser.

This action was brought, to recover from the defendants, the amount of a promissory note, for Rds. 665 5 sk. 2 st., made by Buissinne, in favour of Crous or order, dated 27th February, 1822, payable three months after date, value in account, and indorsed to plaintiffs, by Maasdorp, the authorised agent of Crous.

Discount
Bank
v.
Heirs of
Crous.

Buissinne had become insolvent.

The defendants pleaded, that the claim of the plaintiffs, against Crous the indorser, is barred by their failure, to give Crous notice, of the non-payment of the note by Buissinne, until 1827, and quoted Lybreght, Notaris Ambt. Vert., vol. 2, c. 39, p. 323.

The plaintiffs replied, The note was made by Buissinne,

Discount
Bank
v.
Heirs of
Crous.

solely and exclusively, for the accommodation of Crous, by whom it was discounted. The debt was his debt, and therefore, it was not necessary, to give him notice, of the non-payment by Buissinne.

It was proved, that the note in question, was granted by Buissinne, to enable Crous, to take up a note for Rds. 1000, made by Crous in favor of Buissinne, and discounted with the plaintiffs, by Buissinne, for the accommodation of Crous, and the proceeds of which, had been handed over, by Buissinne to Crous, who took it up when due, by paying Rds. 333 2 sk. 4 st., out of his own funds, and discounting the note now in question, for the balance. That at the time, the note in question was granted by Buissinne, he was indebted to Crous *f.* 20,000, on a notarial bond, dated 22d January, 1816, and payable 22d January, 1821, and bearing interest, but payment of which, when due, had not been called in by Crous,—and that, if this bond debt, were to be taken into account, when the note in question was given, the balance would have been in favor of Crous, and against Buissinne. But Buissinne swore, that neither the note for Rds. 1000, nor that in question, had any thing whatever, to do with the bond for *f.* 20,000.

From the above, and the other evidence in the case, as to the course of transactions, between Crous and Buissinne, The *Court* were unanimously *of opinion*, that the note now sued on, had been made, solely for the temporary accommodation of Crous,—was intended by the parties, to have been taken up by Crous, and was not intended, to have any concern, or in any way to interfere, with the bond for *f.* 20,000, or to be given by Buissinne, or received by Crous, as in part payment, of either the capital or interest, on the said bond, and therefore gave judgment for the plaintiffs, with costs.

IN RE DE VILLIERS.

COMMISSARIES OF VENDUE *v.* SEQUESTRACTOR, CIVIL COMMISSIONERS OF CAPE DISTRICT AND STELLENBOSCH.

[2d June, 1829.]

Hypothec of Fisc. for Taxes.

Taxes,—whether Personal or Land.

Proclamation of 1st April, 1814.

Preference of Vendue Commissaries—refused.

In Re
De Villiers.
Commissaries
of Vendue *v.*
Sequesterator,
Civil Com. of
Cape Division
& Stellenbosch.

The Vendue Commissaries, had obtained a rule against the respondents, to show cause, why the scheme of distribution should not be altered, and the Vendue Commissaries preferred, on the general assets of the estate, to the Civil Commissioners

of those districts, to whom a preference had been awarded, for Rds. 690 7 sk. 5 st., as being arrears of *personal taxes*, due by De Villiers to Government, under the provisions of the Proclamation of the 1st April, 1814, which the applicants maintained, to be *land taxes* due, in respect of certain landed property, which had belonged to the insolvent, now in the possession of his trustees, and which therefore, ought to have been made a burden, in the first instance, on the proceeds of this landed property, in respect of which they were due.

But the *Court held*, that in respect of the provisions of the Proclamation of the 1st April, 1814, all the taxes levied in the country districts, were personal taxes, and discharged the rule, without costs.

In Re
De Villiers.
Commissaries
of Vendue
v.
Sequestrator,
Civil Commis-
sioners of Cape
District and
Stellenbosch.

11th June,
1829.

IN RE KOTZE.

BRINK *v* JOUBERT.

[2d June, 1829.]

Mortgage of Slaves,—Registration necessary, both in the Slave Register and the Colonial Debt Register—preference regulated by the last.

Proclamation of 30th January, 1818.

The facts of this case were, that Joubert had sold a slave to Kotze;—that for a part of the price, Kotze mortgaged the slave to Joubert, on the 28th July, 1824, and this mortgage bond, was duly enregistered in the Slave Register, on the 10th of August, 1824, but was not registered, in the Colonial Debt Register, *until the 9th December, 1826.*

Before which last mentioned date, Kotze had mortgaged the same slave to Brink, by a bond, which was dated 22d February, 1826, and which was registered in the Slave Register, on the 25th February, 1826, and in the Colonial Debt Register, on the 3d May, 1826.

In the distribution of Kotze's insolvent estate, the Sequestrator had awarded the preference to Joubert, on the proceeds of this slave. Brand for Brink obtained a Rule Nisi on Joubert, to show cause, why the scheme of distribution should not be altered, and the preference awarded to his bond.

After hearing parties, when Joubert founded his claim on the Proclamation of 30th January, 1819, §§ 8, 9, and 10, and Brink, his claim on § 11 of that Proclamation,*—the Court made the rule absolute, and thus awarded the preference to Brink's bond, as being the first, the registration of which was duly completed. (*Vide post.* Discount Bank *v.* Dawes, 28th September, 1829.)

In Re Kotze.
Brink
v.
Joubert

* Van Leeuwen, Cens. For. lib. 4, c. 11, n. 8.

IN RE LAUBSCHER.

MOLLER, q.q. SUNDRY CREDITORS v. SEQUESTRATOR AND OTHERS.

[2d June, 1829.]

1. *Sequestration, (old Law)—no release from Sequestration can take place, before the expiration of the period allowed to Creditors, to lodge their Claims,—nor effectual against the Creditors, who have not consented to such Release.*
2. *A Person discharging the Debt of an Insolvent, after surrender, entitled to rank in the same order, as the Creditor, whose Claim has been discharged, would have ranked.*

In Re
Laubscher.
Moller, q.q.
Sundry Cre-
ditors
v.
Sequestrator
and Others.

1. In this case, Laubscher, on the 25th June, 1827, surrendered, in the usual form, his whole estate to the Sequestrator as insolvent, and in the *Gazette* of the 29th June, the Sequestrator inserted the notice to his creditors, to lodge their claims, which by law was required to be given, when the surrender of an estate was accepted by the Sequestrator.

It was proved by an affidavit of the Sequestrator, that Laubscher stated in his letter of the 25th June, 1821, by which he surrendered his estate as insolvent, that he did so,—in consequence of the sentences which had been given against him, and lodged with the Sequestrator, one of them at the instance of the Discount Bank;—that, notwithstanding the above notice in the *Gazette*, no other claims had been filed by Laubscher's creditors, with the Sequestrator, before the 5th July, 1827, on which day Laubscher had called at his office, and paid the amount of the above mentioned two sentences, which alone had been lodged against him, and gave the Sequestrator, a notice in writing of that date, stating, that he withdrew his surrender of the estate. In consequence of which, the Sequestrator gave notice in the *Gazette* of the 6th July, "that the sentences, filed for enforcement against N. W. Laubscher, having been withdrawn from this office, and he having recalled his letter, by which he surrendered his estate under sequestration, his estate was in consequence released from such sequestration."

On the 22d August, 1827, Laubscher finally surrendered his estate.

On the 21st June, 1827, Laubscher had granted a bond, for £250, to A. Brink, D.s., and on the 22d June, another bond for £350 to A. J. Louw. These bonds were registered on the 25th June, the very day of the first surrender; and on the 6th July, the said A. Brink, to whom Laubscher had on

the 4th July, granted a general power of attorney, executed a mortgage bond for £90, specially mortgaging three slaves to and in favour of Spengler, which bond, subsequently by cession, came to belong to W. J. Louw.

The Sequestrator, in framing his scheme of distribution, under the second sequestration, preferred those three bonds, before the claims of the creditors, who were now represented by Moller, all of which, were prior to the date of the first surrender, but were concurrent claims, having no privilege or preference. If the first surrender, had not been recalled, Brink's and A. J. Louw's bonds, registered on the 25th June, and Spengler's bond, would have been entitled to no preference. It was contended by those three creditors, that the whole transaction was *bonâ fide*, and unimpeachable, and by Moller, that the withdrawal of the first surrender, was a fraudulent scheme, to obtain an undue preference, for these three creditors. But the Court, without reference, to whether the transaction was fraudulent or *bonâ fide*, held, that a debtor, who has surrendered his estate, cannot, within the six weeks allowed to creditors, to lodge their claims, obtain its release, merely because those creditors, who have lodged their claims, have had their claims discharged, or have consented to the release,—and that no creditor, who has not consented to the release, can in respect of such release, be deprived of the rights and privileges, which he was entitled to, in virtue of the sequestration, if the release had not taken place; and ordered the Sequestrator, to prepare a new scheme of distribution, on the principle, that the first surrender was effectual, and had not been withdrawn or discharged.

And gave costs to Moller, against the then opposing creditors.

Denyssen for Moller, quoted: Matthæus de Auctionibus, lib. 1, c. 19, § 102-107; l. 6, § 7; *ff quæ in fraudem credit* (42. 8); Voet, 42: 8, 17, 18.

Brand *contra* quoted Huber Prælect ad. Pand. l. 42, t. 3, § 3; Voet 42: 3, 9.

2. *Postea*.—On the application of A. Brink, by whom, or with whose funds, it appeared, that the sentence above mentioned, in favor of the Discount Bank had been discharged;

The Court ordered the Sequestrator, to amend the scheme of distribution, which he had made up in terms of the order of the 2d June, so as to rank Brink, for the amount paid by him, in discharge of the said sentence, in favor of the Discount Bank, in the same way, that the Discount Bank would have been ranked, in respect of that sentence, if it had not been discharged.

In Re
Laubscher.
Moller, q.q.
Sundry Cre-
ditors

r.
Sequestrator
and Others.

24th October,
1829.

VAN REENEN *v.* HIS CREDITORS.

[4th June, 1829.]

Rehabilitation, (old Law) refused, because Article 53 of Sequestrator's Instructions, not complied with,—also,—because Insolvent had been convicted of Fraud, against his Creditors.

Sequestrator's Instructions Art. 53. 54.

Van Reenen
v.
His Creditors.

Van Reenen applied for his rehabilitation, and proved, that he had obtained the consent, of fifty-five out of sixty creditors. But the remaining creditors, having opposed the application, on the ground, 1st, that the Sequestrator had not signed the declaration, required by Article 53 of the Sequestrator's Instructions, and 2dly, that the applicant had been convicted of stellionate, for having defrauded his creditors.

The Court refused the application, with costs.

Vide Article 54, Sequestrator's Instructions.

IN RE WID. LAUBSCHER.

DISCOUNT BANK *v.* LAUBSCHER'S HEIRS AND GUARDIAN OF SLAVES.

[30th June, 1829.—18th December, 1832.]

Registration of Slaves—right of Ownership to Slaves, determined by the Slave Registry.

Slaves,—their Right not determinable by Motion, but by Action.

Proclamation, 30th January, 1818, §§ 3, 5, 8.

In Re Wid.
Laubscher.
Discount
Bank
v.
Laubscher's
Heirs and
Guardian of
Slaves.

On the 11th July, 1816, a mutual will was executed by Laubscher and his wife, by a codicil to which, the testators bequeathed to their daughter, J. J. Laubscher, after the death of the survivor of them, their slave Fredrik,—to their son P. W. Laubscher, their slave Africa,—to their son H. J. Laubscher, their slave Achilles,—but upon condition, that their said children shall not be at liberty, ever to sell the said slaves, who shall continue in the family of the said children.

Laubscher died, and on the 27th November, 1816, certain of the slaves, mentioned in the codicil, were duly enregistered in the Slave Register, as the property of the Widow Laubscher, who by a bond, dated 8th April, 1819, registered in the

Slave Register on 27th February, 1821, and in the Debt Register, April, 1821, mortgaged those slaves to the Discount Bank.

On this bond, the Bank obtained a judgment of the late Court, declaring the mortgaged slaves executable.

The heirs thereupon applied for, and obtained an interdict, against the sale of those slaves.

The Discount Bank had obtained a rule on the heirs, to show cause, why the interdict should not be recalled, and the slaves sold by the Sequestrator, in execution of the said judgment.

This day De Wet, for the heirs, showed cause, and maintained, that under the provisions of the mutual will, the heirs had acquired such a right in the slaves, as deprived the widow, of the right to have those slaves registered, as her absolute property;—that the slaves having therefore been *improperly registered*, as her property, the enregisterment could give her no right, to grant a valid mortgage over those slaves;—and that the Discount Bank, who contracted with her, could be in no better situation than the widow.

The Court, without entering into the question, as to the respective rights of the widow and the heirs, to the slaves under the will, and in respect of the provisions, of the §§ 3, 5, and 8 of the Proclamation 30th January, 1818, *held*, that in a question with third parties, the property of the slaves, must be deemed in law, to be in the person, as whose property they were registered, and thereupon made the rule absolute against the heirs, leaving them to their recourse against the widow's estate;—but *quoad ultra*, enlarged the rule, in order to give the Guardian of Slaves an opportunity, of being heard on behalf of the slaves, as to any rights, which they might have acquired under the will.

Postea.—The Guardian of Slaves, showed sufficient cause, to induce the Court to refuse granting an order, for the sale of the slaves, on a motion, and discharged the rule as to the Guardian and the slaves, reserving to the Discount Bank, to have their title to the slaves tried by a regular action.

Postea.—This day, the Discount Bank moved, to have a rule made absolute, which the Bank had obtained *ex parte*, against the Guardian of Slaves, to show cause why the slaves should not be sold.

But the Court, in respect of the above decision, dismissed the rule, leaving the Bank, to institute their action against the slaves and the Guardian.

In Re Wid.
Laubscher.
Discount
Bank
v.
Laubscher's
Heirs and
Guardian of
Slaves.

30th June,
1829.

18th Dec.,
1832.

ROCHER v. JUDGE.

[12th June, 1829.]

Schoolmaster, not liable to an "actio injuriarum," for expelling a Boy from his School, on a reasonable belief of misconduct, and without Malice.

Rocher
v.
Judge.

This was an action, at the instance of Rocher, as father and natural guardian, of P. Rocher, the plaintiff, a minor, to recover £500 damages from the defendant, the master of the Government School, for having falsely charged and accused the plaintiff, of having stolen five books, which books, were then in the lawful possession of the plaintiff, and having, by violence, and threats of corporal punishment, forced the plaintiff to sign a paper, containing admissions, respecting said books, prejudicial to plaintiff, and having taken from plaintiff, the said books, and unlawfully retained them, and having, without sufficient cause, and proper investigation, and without giving the plaintiff's friends notice, or opportunity, to assist him in investigating said charge, and clearing his character, expelled the plaintiff from the said public school, &c. &c.

The defendant pleaded, 1st, the general issue, 2dly, pleaded in justification, that an accusation having been made, against the plaintiff by another scholar, of having stolen that scholars' book, he had instituted, and fairly and impartially conducted an investigation, (the particulars of which he set forth,) from which it appeared, that the plaintiff was in possession of several books, belonging to other boys, whose names had been erased therefrom, and the plaintiff's name written thereon, without any satisfactory explanation, as to how he had become possessed, of any of them, and that he had given an account, proved to be false, of the way, in which he had become possessed, of some of them;—that the plaintiff had thereupon confessed, that he had taken, not only the said books, but also a Prayer-book, which he promised to return the following day, whereupon the defendant expelled the plaintiff from his school, as he might lawfully do, for the cause aforesaid; after which, the plaintiff sent to the defendant's school, the Prayer-book last mentioned.

The Court were of opinion, that the evidence, led by the parties, negatived all the material averments in the declaration, except the fact, of the defendant having expelled the plaintiff from his school, as having stolen certain books,—and proved all the material facts, alleged in the defendant's plea of justification;—and held, that a charge of theft of books, alleged to have been committed in school, having been preferred, by one of the defendant's scholars, against the

plaintiff, also a scholar, it was the defendant's duty, as schoolmaster, to investigate the charge. That the defendant had made every investigation, which it was proper or necessary, for the master of the school to make, under such circumstances. That the facts, elicited by the investigation, were of such a nature, *as at least to warrant*, if not necessarily and irresistibly to cause, the belief in the mind of any impartial and intelligent person, that the plaintiff had stolen the books. That the defendant having proved, that he had good and sufficient cause, for having formed a *bonâ fide* belief, of the *veritas convicii*, on the grounds above mentioned, it was unnecessary for him, further to establish the *veritas convicii*, or for the Court, to pronounce, whether the plaintiff had actually been guilty of theft or not, he was entitled to the same privileges, as if he had now proved the *veritas convicii*, and therefore, that as it had been proved, that the defendant had not been actuated, by any *animus injuriandi*, and as in making known to his scholars, the decision, which after investigation, he had formed, as to the charge against the plaintiff, and as in inflicting the punishment of expulsion, (which under the circumstances, the *Court held*, to have been a proper and suitable punishment,) he had been acting *bonâ fide*, in the discharge of his duty, as a schoolmaster, he had established a good and sufficient plea, of justification. (*Vide Voet 47: 10, 2, 9. Phillips on Evidence, vol. 2, 256, 7th edit.*)

On these grounds, the Court gave judgment for the defendant, with costs.

Rocher
v.
Judge.

DE VILLIERS, TUTOR, v. STUCKERIS.

[16th June, 1829.]

Guardian—not "ipso facto" deprived of Office by his Insolvency.

In this case, after very full argument, the *Court found*, that the insolvency, or *cessio fori*, of a tutor, did not, *ipso jure et facto*, deprive him of his office, or put an end to his guardianship, but at most, only afforded a ground, upon which the Court might remove him, and that in this case, the plaintiff, not having been so removed while insolvent, could not be now removed, after he had been duly rehabilitated.

Cloete, for the plaintiff, quoted § 6, *Instit. Quib. mod. tut. finitar* (1, 22) *et* § 13 *Instit. de Suspect. Tutor.* (1, 26) *Van Leeuwen Cens. For. pt. I., l. 1, c. 16, n. 23; Voet 26: 1, 2, 7; and 42: 3, 10; Van der Linden's Inst., p. 108, 109.*

De Villiers,
Tutor,
v.
Stuckeris.

De Villiers,
Tutor,
v.
Stuckeris.

Brand, for the defendant, quoted *contra* Prof. Kersteman Regtsg. Woordenboek, voce "Insolventie"; *idem* Secretary van Voogden, c. 5, p. 98, t. 109; Handboek voor Voogden (Anonym.), pt. II., p. 44; Voet 26: 6, 4; and 42: 3, 10.

Judgment for the plaintiff, with costs.

(*Vide* Heydenreich v. Curator of Sandenberg in *re* Wicht. 30th November, 1843.)

RUSSOUW v. STURT.

[23d June, 1829.]

Assault—Criminal Prosecution by Public Prosecutor, no bar to a Civil Action.

"*Exceptio rei judicatæ*," or "*litis finitæ*,"—no answer to a Civil Action of Assault, because of previous Criminal Prosecution.

Russouw
v.
Sturt.

In this case, the plaintiff sued the defendant to make him an *amende honorable*, (an apology), and profitable £500, to be paid to the English Church at Simon's Town, for having assaulted and beaten him.

The defendant pleaded the *exceptio litis finitæ*, in respect, that he had been prosecuted and tried, before the Board of Heemraden of Simon's Bay, for the same assault, and sentenced to pay a fine of Rds. 300, against which sentence, the plaintiff had appealed to the Supreme Court, to have the fine increased, which appeal had been dismissed.

Vide supra p. 286, *inter eosdem*, 21st February, 1828, and quoted Voet 44: 2, 3; and 47: 10, 17, 18, 24; Crown Trial, § 113.

Denyssen, for the plaintiff, maintained, that the prosecution at Simon's Town, was a criminal prosecution, at the public instance, and not at the instance of the plaintiff, who was no party to it, and consequently, what was done in that Court, could not be pleaded as *res judicata*, against the plaintiff.

The Court were unanimously of opinion, that a criminal prosecution at the public instance, does not bar the injured party, from his civil action for amends, but that the injured party, cannot both prosecute criminally and sue civilly, for the same injury, but must make his election.

But as to the question, whether the plaintiff was to be deemed, to have been a party to the criminal prosecution at Simon's Bay, the Judges differed in opinion. The record of the proceedings, before the Court of Heemraden, did not state, or in any way indicate, that the plaintiff had been a party to the proceedings in that Court, and on this ground, the

majority, (Chief Justice and Burton, J.) *held*, he must be deemed, not to have been a party, and overruled the exception.

Russouw
v.
Sturt.

Menzies, J., *held*, that, as the plaintiff had, in the proceedings in the appeal, prosecuted by him, judicially averred, that he had been the *complainant*, in the case appealed, (which by § 113 of the Crown Trial, gave him the legal character of prosecutor, and subjected him, to all the consequences of the prosecution,) he was barred *personali exceptione*, from now pleading, that he had not been the complainant, and consequently, that the Court, could not now look into the record, in the Court below, to ascertain, whether he had been a party or not, and on this ground, *held*, that the exception should be sustained.

Exception repelled, with costs.

WELLS v. MACKENZIE, q.q. CAMPBELL.

[30th June, 1829.]

Indemnification, ordered by Arbitrators to be given, means merely Personal.

The plaintiff had obtained a rule on the defendant, to show cause, why he should not perform an award, which had been made a rule of Court.

Wells
v.
Mackenzie,
q.q.
Campbell.

The defendant offered performance, provided the plaintiff should perform his part.

The question between the parties was, whether the *indemnification* from the plaintiff, which the arbiters had awarded, should be given by the plaintiff to the defendant, meant, the plaintiff's personal obligation to indemnify, or good security by third parties, to indemnify the defendant.

The Court *held*, that *indemnification from the plaintiff*, meant *personal indemnification*, and made the rule absolute, with costs.

JONES v. CANNON.

[4th Sept., 1829.]

Evidence—Declaration made before a Notary by a person, since dead, and not sworn to, not admissible.

Joubert, for the plaintiff, proposed to put in evidence, the declaration before a notary, made, according to the form of procedure in the late Court, by a person, intended to have

Jones
v.
Cannon.

Jones
v.
Cannon.

been produced as a witness, but who had died, before he had been in the usual form *recalled* and sworn, to the truth of his declaration, and maintained, that even if it could not be deemed, to be complete legal evidence, he was entitled to put it in, for the consideration of the Court, *ad informandum animum Judicis*, and quoted Van der Linden Judic. Practyk., b. 3, c. 4, § 5; Voet 22: 5, 14, 15; *l. ult C. de Testib.* (4. 20.)

The Court held, that whatever might have been the practice in the late Court, this declaration, could not be put in evidence, for any purpose, or to any effect, in this Court, and rejected the declaration.

RUTHVEN v. POGGENPOEL.

[4th September, 1829.]

Injury Verbal—what words not actionable.

Ruthven
v.
Poggenpoel.

This action was brought, to recover damages from the defendant, for the injury sustained by him, by reason of certain defamatory words and expressions, spoken by the defendant, of, about, and against the character of the plaintiff.

The defendant had granted a promissory note, for Rds. 400, which came into the plaintiff's possession, who caused it to be presented to the defendant for payment, on which occasion, it was alleged, that the defendant had said: "that the whole of said note, had long ago been paid, and that he owed the plaintiff nothing," although he well knew, that Rds. 300 were still due on it by him to the plaintiff.

These were the words on which the action was founded.

After hearing the case opened, by Mr. Denyssen for the plaintiff, the Court, without calling on the defendant, held that those words, afforded no ground of action, and dismissed the action, with costs.

IN RE INSOLVENT ESTATE OF LOUDON.

DISCOUNT BANK v. DAWES.

[28th September, 1829.]

Preference,—Notarial Bond,—General Mortgage,—no preference, unless enregistered in General Registry Office.

Special Mortgage on a Slave,—no preference without such Registry, although enregistered in the Slave Registry Office.

Discount Bank Notes,—no preference, although enregistered.

Proclamation, 1st June, 1808,—of what effect in question of preference.

On the 31st December, 1827, the late Court, had approved of a scheme of distribution, of the insolvent estate of Loudon, by which Dawes was preferred, in respect of an unregistered notarial bond, granted to him by Loudon, over the Discount Bank, claiming on notes of hand, made or indorsed by Loudon, and discounted to him by the Bank, and which had been registered by the Bank, in the debt register.

In Re Insol-
vent estate of
Loudon.
Discount
Bank
v.
Dawes.

The preference was given, over the proceeds of six stuckvats, six leaguers of hock, and a slave, which were specially hypothecated in the notarial bond.

The hypothecation of the slave, was not registered in the colonial debt register.

The bond, also contained the usual clause, of general mortgage, binding, in security of the debt, his whole property, moveable and immoveable.

An appeal was noted against this sentence, but it was afterwards agreed between the parties, that the case should be set down for argument.

The case was partly argued on the 8th September, when Joubert, for Dawes, admitted, that, never having had delivery of the stuckvats, &c., he could not claim any preference over their proceeds, as having been specially mortgaged to him.

Postea.—Cloete, for the Bank, maintained;

24th Septem-
ber, 1829.

That the Bank were, by law, entitled to preference, on notes of hand, whether passed in their favor, and before the president, &c., of the Bank, or coming into their possession by indorsation, and by them registered in the debt register.

He quoted the Government Advertisement, 1st June, 1808, particularly § 15 and 16, and Proclamation of 10th December, 1824, art. 3, and maintained, that the Bank, was by these Ordinances, entitled to register notes of hand, whether originally made in their favor, or of which they had become the holders by indorsation; that from the date of the registry, such notes became equivalent to registered public bonds, having a clause of general hypothecation, and ranked after special mortgages, according to the dates of their registration, and that this preference on registered notes, applied, not only to the estate of the original obligant in the note, but also to that of the indorser.

2dly. He maintained, that a notarial bond, having a clause of general hypothecation, but not registered, not only, cannot compete with a registered general hypothecation, but is not

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

preferent, to simple underhand obligations, and therefore, that Dawes was not, in respect of his bond, entitled to any preference over the Bank, even although the registered promissory notes, held by them, were deemed to be only concurrent debts.

He stated, that, although in the older books of decisions, different opinions are expressed, as to whether the rules of the law of Rome, had been completely adopted, into the law of Holland, yet, that this question, was put at rest, as to immoveable property, by the Placaat of the 1st February, 1580, introducing a public register, in which, under pain of nullity, all transfers and hypothecations of immoveable property, were to be registered. Decisions, however, still continued to fluctuate, as to the rights of preference, over moveables.

He quoted *Bellum Juridicum*, case 4, p. 27, where it was found, that a notarial bond, on which the 40th penny, had not been paid, was not entitled to any preference on moveables, over simple underhand obligations, but could only rank as a concurrent debt, with them. *Van Leeuwen Rom. Dutch Law*, b. 4, c. 13, pp. 365, 366, 367, Eng. ed.; *Cens. For.*, lib. 4, c. 11, § 16; *Voet* 20: 1, §§ 12, 14.

He admitted, that he could not find any express regulation, that conventional hypothecations of moveables, should be registered.

He then quoted the Placaat of 27th June, 1776, Gr. Pl. B., vol. 7, p. 529, applicable to Zealand alone, which provides, that no hypothecation of moveables, shall be entitled to any preference, unless the bonds are registered, within 8 days, after the passing of the instrument; and *Van der Keessel*, Thes. 427, 430, 432, 435, that hypothecations of moveables, *non valent*, unless payment had been made, of the 40th penny, except orphan bonds, tacit hypothecs, and bottomry bonds, or unless they were accompanied by tradition.

He therefore contended, that, by the law of Holland, there could be no doubt, that notarial bonds, containing a general hypothecation of moveables, were not entitled to any preference, unless registered.

In order to show, that the law of this colony, was the same with that of Holland, he quoted the Proclamation, 19th June, 1714, and stated, that the register of this colony showed, that the first general hypothecation, was registered in 1718, another in 1724;

That the first secretarial bonds, were registered on 9th November, 1744;

That the first special mortgage of slaves, was registered on 8th September, 1760;

That notaries, were first admitted to practice, on 2d April, 1793;

And that the first notarial bond, which contained a general mortgage, was registered on 18th December, 1793;

That on the 8th June, 1795, a special mortgage of slaves, and of merchandise, was registered;

That in January, 1796, a special mortgage of slaves, constituted by a secretarial bond, was registered, and on the 7th January, 1799, a special mortgage bond of moveables, as per inventory.

These instances, were taken at random, from a volume of the Index of Records, (which Index is kept alphabetically, and not in the order of date,) because the volumes containing the registered bonds, cannot easily be inspected.

It was admitted on both sides, that there was no instance known of a notarial obligation for a debt, in which a clause of general hypothecation, was not inserted.

He referred to the Proclamation of 22d April, 1793, Proclamation of the 15th and 23d May, 1805, and maintained, that this last Proclamation, recognised as law, the practice which had existed, for so many years before, and therefore, established the law for the future, according to the previously existing practice.

He contended, that the Government Advertisement, of 1st June, 1808, §§ 13, 15, 16, and Proclamation of 30th January, 1818, § 11, and Proclamation of 9th May, 1823, supported this proposition.

Argument adjourned.

Postea.—Cloete, in continuation, quoted Placaat, 16th April, 1671, (Gr. Plac. B., vol. 3, p. 1008;) Placaat, 22d June, 1695, §§ 28, 36 (Gr. Plac. B. vol. 4, pp. 907 and 909); Placaat, 11th March, 1723 (Gr. Plac. B., vol. 6, p. 1030); Placaat, 9th May, 1744 (Gr. Plac. B., vol. 7, p. 1441); Van Leeuwen, Cens. For., 4: 7, 12, and 4: 11, § 8; Lybrecht, Notaris Ambt, Vertoog, vol. 2, c. 33, n. 11, p. 263.

In Re Insol-
vent estate of
Loudon.
Discount
Bank
v.
Dawes.

28th Septem-
ber, 1829.

Joubert contended, that the Bank had shown no authority, in support of the claim for preference; in respect of promissory notes, registered by the Bank. The Discount Bank, had been instituted in 1809, and yet, the first registration of promissory notes, took place only in 1812; and on the second point, maintained, that by the law of Rome, and of Holland, it was a universal, and before 1665, an undisputed rule, that public instruments, *i.e.*, those executed before a notary, or before three witnesses, with a clause of general hypothecation, had a preference over debts, constituted by private deeds, except upon money, the proceeds of immoveable property.

Dutch Consult. vol. 4, case 190, 19th April, 1641; Loenius, case 26, April, 1625; Bellum Juridicum, *ut supra*, case 4, 1679; Placaat 18th May, 1770 (Gr. Plac. B., vol. 9, p. 508);

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

by which it was decreed, that notarial bonds, granted by persons, in the service of the East India Company, dying insolvent, in the East Indies, wherever they might have been passed, (apparently meaning bonds passed abroad,) should be preferred to all private instruments. (Proclamation of 22d April, 1793; Proclamation of 22d April, 1805; Proclamation of 30th January, 1818; Proclamation of 9th May, 1823.) And concluded, by maintaining, that the notarial bond of Dawes, was entitled to a preference, on all the moveables in the estate, over all debts, constituted by private instruments.

2dly. That he was entitled, to a preference on the slave, over all debts, constituted by any instrument, except a registered notarial bond. He admitted, that it was the practice of the colony, to give a preference, to posterior registered notarial bonds, over prior unregistered notarial bonds.

The *Court held*, that there is nothing in the Proclamation of June, 1808, which can in any way, support the claim of the Bank to a preference, in respect of promissory notes, registered by the Bank. Looking at the whole of this Proclamation, and particularly at §§ 11, 12, 13, 14, 15, 16, 17, it is evident, that, when it was issued, it was not contemplated, that the Bank should advance money, on simple notes of hand, either made in favor of, or indorsed to the Bank.

The only preference, created by this Proclamation, is in favor of "*deeds of mortgage*, passed in the Loan Bank," and which, on being registered, shall be considered as legal mortgages. It is true, that in section 16 it is said, that the obligations for loans, for six months or under, shall be on a stamp of Rds. 2, and that the fee for enregistering them, is to be continued. The *Court held*, that under this clause, the Bank was entitled to enregister obligations, for short loans, of the kind here contemplated, and that on their enregisterment, they would become entitled to preference, as legal mortgages. But the Court was of opinion that the *obligations*, here contemplated, were *deeds of mortgage*, passed in the Bank, for loans for six months or under, and that, even supposing, that the Bank were authorised, to lend money for short periods, on promissory notes, that the provisions of sections 15 and 16, were not intended, to apply, and do not apply, to such promissory notes. That this opinion is confirmed, by the provision in section 16, that the deeds therein contemplated, were to be on a stamp of two rix-dollars, and the provision in the Proclamation of the 22d May, 1812, art. 3, that "*deeds on short loans*," passed in the Government Bank, are in all cases, to be on a stamp of Rds. 1 4 sk., while promissory notes in favor of, or indorsed to the Bank, are to be written on, or covered with stamps of different values, in proportion to the sums, for which they are passed. Article 3, of the

Proclamation of the 30th April, and 10th December, 1824, are precisely in the same terms, except, that the stamps for deeds on short loans, are raised to Rds. 1 24 st. From this, it is manifest, that "obligations for short loans," did not mean underhand notes, and consequently, the 16th section of Proclamation, 1808, has no application to underhand notes.

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

As to the practice, which is said to have existed, it is not alleged, that any notes were registered before 1812, although the Discount Bank, existed for several years, before that time, and it is admitted, that the Bank, have since then, always enregistered such notes. Of the origin of this practice, no certain information has been furnished, but in so far, as the Court has been able to learn, the practice originated, from an order, verbally given, by the Colonial Secretary, to the keeper of the register. It is not alleged, that the question, as to the right of preference of such registered notes, was ever raised in the late Court; therefore, although it may have been the uniform practice of the Bank, to enregister such notes, and for the Sequestrator, to award them a preference, in his scheme of distribution, and for the late Court, to confirm such scheme, the Court held, that they ought not, by their judgment, to sanction a rule of preference, which is utterly inconsistent, with the principles, of the general law of the colony, merely in respect of a practice, of a few years' duration, which did not originate from, and has not been sanctioned, or recognised by any special law of the colony, nor by any decision of the Court, in *foro contentioso*.

On these grounds, the *Court held*, that the Discount Bank, is not entitled, to any preference whatever, in respect of underhand notes, or obligations, whether made in favor of, or indorsed to the Bank, and enregistered in the colonial debt register, and that the Bank, must in this case, be ranked only as a concurrent creditor, for any such notes, on which it has claimed.

With respect to the second question, whether a notarial bond, containing a clause of general hypothecation, but not registered, has in law, any right of preference, over the moveable property of the debtor, or is to be considered as, and ranked among the concurrent debts, the *Court held*, that a bond of the nature, of that now in question, executed before a notary, must be considered as a public instrument. (*Vide* Van Leeuwen Rom. Dutch Law, b. 4, c. 13, § 20, p. 366, Eng. ed.; Voet 20: 1, § 12.)

That by the law of Rome, and of Holland, up to a certain period, such a bond, as being a public instrument, would have been preferred, before all private or underhand bonds, or obligations, whether posterior or prior in date. (*l. 11, Cod. Qui pot. in pign.* (8. 18); Voet 20: 1, 12.) But that the

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

rules of the civil law, on the subject, of the preference of hypothecs, were in Holland abrogated and altered, 1st, by the Placaat of the 1st February, 1580, which provided, that all transfers, and hypothecations of immoveable property, should, under pain of nullity, be enregistered in a public register; and 2dly, by the Placaat, 5th February, 1665, (which has been renewed, continued, and made perpetual by subsequent Placaats,) by which it was provided, "that henceforth, no hypothecs, general or special, either *schepenkennis*, notarial, or other bonds, of what nature soever they may be, shall have any preference, either on moveable or immoveable property, actions or claims, unless a duty of 2½ per cent. shall have been paid thereon, at the time when such bonds are passed." It then specially excepts, from the operation of this provision, bonds, passed to the Orphan Chamber, on behalf of orphans, under the guardianship of the Chamber, the legal hypothecs of the Roman law, bottomry bonds, moveables pledged in the Lombard Bank, or placed in possession of creditors, in virtue of lawful contracts. Accordingly, it was soon after decided, (*vide* Bellum Juridicum, p. 27, casus 4, 22d July, 1679,) that a notarial bond, on which the 40th penny had not been paid, was not entitled to any preference on moveables, over simple underhand obligations, but could only rank as a concurrent debt with them. See also Van Leeuwen, Rom. Dutch Law, b. 4, c. 13, § 19 and 20, pp. 364, 365, 366; Voet 20: tit. 1, § 12; Van der Keessel, Thes. 427, 430.

From all these authorities, it is clear, that after the promulgation of the Placaat 1665, no public instrument, containing a clause of general hypothecation of moveables, was entitled to any preference whatever, unless payment of the 40th penny, on the amount of the debt, had been paid, when the instrument was passed. No additional, or new preference was acquired, for any general hypothec, by the payment of the 40th penny, but all right of preference, was absolutely taken away, when the 40th penny had not been paid. (*Vide* Van der Keessel, Thes. 431.) That it is quite clear, that all hypothecs over immoveable property, in order to be entitled to any preference, must not only have paid the 40th penny, but *must also* have been registered, in the public register.

It has been strenuously contended for the Bank, that the same was the law, as to the general hypothecs of moveables, and that although the 40th penny had been paid, they were not entitled to any preference, unless registered in the public debt register, and that this must have been the case, because all bonds, on which the 40th penny was paid, must of course have been registered, at the time the payment was made. The Court have been unable, to discover, why registration,

should have been a necessary consequence, of the payment of the 40th penny, on the amount of the bond; and from the Thesis 433 of Van der Keessel, it appears, that registration was not a necessary consequence, of payment of the 40th penny.

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

It is admitted that no Placaat, Ordinance, or Law of Holland can be found, requiring registration of general hypothecation of moveables, under pain of nullity, or loss of preference, in the same way, that registration of all hypothecations of immoveable property, is required by the Placaat of the 1st February, 1580. It is true, that where the property of the debtor was generally hypothecated, and the creditor wished it to be effectual, against the immoveable property of the debtor, he must, besides paying the 40th penny, have had the hypothecation passed *coram lege*, and registered. But the question is, supposing he was content, to limit his hypothec to the moveables of the debtor, was it necessary for the creditor, to cause it to be registered, in order to preserve its preference, over moveable property?

With the exception, of one very ambiguous passage, in the Roman Dutch Law, of Van Leeuwen, p. 366, B. 4, c. 13, § 20, and one passage in Voet 20: 1, § 12, the Court have not been able, to find any authority, for maintaining the proposition, that registration was necessary, to entitle general hypothecations, to a preference over moveables, while the following authorities, Groenwegen *ad. l.* 11, Cod. lib. 8, tit. 18; and *ad. l.* § 7; Inst. lib. 4, tit. 6; Van Leeuwen Cens. For., B. 4, c. 7, § 4—12, and B. 4, c. 11, §§ 3, 9, 15, 16; Van der Keessel Thes. 427 to 433; and 447, appear, to lead to the conclusion, that the registration of such hypothecs, was not required by the law of Holland. The passage in Voet lib. 20, tit. 1, § 12, beginning with the word "Porro," if it applies to a general, and not special hypothecation of moveables, which is by no means free from doubt, may be so construed, as to lead to the conclusion, that a general hypothecation of moveables, without something else being done, to strengthen it, will not affect moveable property, of which the creditor has not received tradition.

The result of the investigation, of those authorities was, that the Court was rather inclined, to hold, that registration of such hypothecs, was not required by the law, or practice of Holland, in order to be effectual over moveable property. The Court was satisfied, however, that if, by practice alone, a rule had gradually been introduced in Holland, of registering such bonds, and refusing preference to those not registered, such rule, would not have been inconsistent with, or in opposition to any rules or principles, recognised in the law of Holland, after the promulgation of the Placaats of 1580 and

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

1665, and would have had a strong analogy, with some of the established rules of that law.

When this colony was settled by the Dutch, the general principles and rules of the law of Holland, were introduced here, but by such introduction of the law of Holland, it did not follow, that special and local regulations, should also be introduced; accordingly, the provisions of the Placaat of 5th February, 1665, as to the payment of the 40th penny, have never been part of the law of this colony, because this tax, has never been imposed on the inhabitants of this colony, by any law, promulgated by the legislative authorities, within this colony.

In like manner, until a law had been passed here, creating a public register, the provisions, of the Placaat of 1st February, 1580, were not in force or observance here. See the Preamble of the Proclamation of the 19th June, 1714.

By that Proclamation, however, it was provided, that all *kusingbriefs*, *schepenkennissen*, *bonds* passed in the Orphan Chamber, and before the commissioned members of the Court of Justice, whereby any immoveable property was hypothecated, should be registered, in the office of the Colonial Secretary, under pain, of being deprived of the right of preference, which they would otherwise have had, before other debts.

By this proclamation, the law of this colony, was made precisely the same, with that of Holland, on the promulgation of the Placaat 1580.

The Proclamation 1714, does not require the registration, of any hypothecation, affecting moveable property; but the Preamble, would have been equally applicable to such a regulation, as it is to the provision, requiring the registration of hypothecations of immoveables, and therefore any practice, by which a rule might be introduced, requiring the registration of hypothecations of moveables, under pain of loss of preference, would not be inconsistent, but would be in strict analogy, with the principles on which the provisions of that Proclamation were enacted.

From the extracts from the register, which have been produced, it appears that, very soon after the establishment of this register, general hypothecations, and secretarial bonds were registered, as also special hypothecations of moveables. It also appears, that the first admission of notaries, which took place in this colony, was on the 2d April, 1793, and that, at least so soon as 18th December, 1793, notarial bonds, containing a general clause of hypothecation, were registered. The practice, of registering general hypothecations of moveables, and particularly those, contained in notarial bonds, is thus clearly established, and from the fact of their being registered, it may be presumed, (for on this point the Court has had no

information,) that preference, was refused by the Court, to those, which were not registered. On the 22d April, 1793, a Proclamation was issued, which is of no importance, to the decision of the present question, as it merely provides a remedy, for the neglect of the provisions of the Proclamation 1714, and for its strict observance in future.

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

But in Article 6, of Instructions of Commissioner-General De Mist, it is declared, to be the duty of the Secretary, and Keeper of the Records, "to enregister all obligations, known under the name of *schepenkennis*, *kustingbriefs*, Orphan Master's bonds, *kinderbewyzen*, *notarial* and other obligations." Now, as no effectual hypothecation of immoveables, could be made by a notarial bond, and as notarial bonds, invariably contain a clause of general hypothecation, this instruction, is tantamount to an instruction, to the keeper of the register, to enregister general hypothecations of moveables, and consequently, recognised the right of the holders, of such hypothecations, to have them enregistered.

It may here be remarked, that it appears, to have been the uniform practice, of this colony, to enregister mortgages of slaves.

In 1805 (23d May) a Proclamation was issued, by General Jansens, in the preamble of which, it is declared, "that the public registers, in which all mortgages, legal engagements, and *notarial*, and secretarial bonds are registered, were in an imperfect state." In order to remedy this evil, a committee is therein appointed, to examine, "whether all *kustingbriefs*, bonds, passed into the Secretary's Office, Orphan Chamber and Bank, as also *all other PUBLIC bonds*, be duly registered. For which purpose all proprietors of such bonds, as it is *customary*, to enter on the public registers, are directed to produce the same, that, if not previously enregistered, they may be registered. And all existing bonds, not exhibited to the committee, and consequently not registered, are deprived of the right of preference."

It is true, that this Proclamation, does not provide any regulation, as to enregistering any such bonds, which may be granted in *future*; but it clearly recognises, not only the *custom*, in consequence of which, notarial and other public bonds, had been registered, but also the rule introduced by custom, of depriving all such bonds, as were not registered, of the right of preference. If it had not been the opinion, of the then legislative authority of the colony, that, by the then existing law of the colony, such bonds, if not registered, were not legally entitled to a right of preference, they would never have enforced the registration, of those in existence, but not hitherto registered, by a declaration, that they would be deprived of preference, if not produced and registered.

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

The rule as to the registration of, and loss of preference, by such bonds, if not registered, which had been introduced into the law of the colony by custom, is here recognised as law, by the legislative authority of the colony. This Proclamation, must therefore be considered, as declaratory of the existing law of the colony. This view of the question, derives additional support, from the Proclamation of the 30th January, 1818, § 11, from which it clearly appears, that hypothecations of slaves, ought by law to be enregistered, in the Colonial Debt Register, and also from the Proclamation of the 9th May, 1823, from which it is obviously to be inferred, not only, that all hypothecations of slaves, ought to be registered in the Public Debt Register, but also, that all public bonds, ought to be so enregistered.

Seeing, then, that the rule, requiring the registration of all public bonds, and *particularly of notarial bonds*, containing a general hypothecation of moveables, under the pain of being deprived, of all right of preference, has in practice been in observance, for more than a century, and ever since the introduction of notaries,—that in favour of this rule, many reasons of public expediency, may be assigned,—that so far from being inconsistent, with any of the established principles of the law of this colony, it is in strict analogy, with the rules and principles, established as to hypothecations of immoveable property, by the Proclamation of 1714, by which a public register was first introduced, into this colony, and that it has clearly been recognised, as part of the existing law of the colony, in the Instructions of De Mist, and the Proclamations of 1805, 1818, and 1823. The *Court was of opinion*, that they are now bound, to consider it as part of the existing law of the colony, and to enforce it accordingly.

That therefore, the notarial bond in question, not having been registered, has lost all right of preference, which it would otherwise have had, in virtue either of the clause of general hypothecation, which it contains, or of its being a public instrument, and must be ranked among the concurrent claims, on the estate of the insolvent, both as to the moveable property in general, and as to the slave therein mortgaged, although it was registered in the Slave Register. For, the registration of mortgages of slaves, in the Slave Register, was an additional solemnity, required by law, to render such mortgages valid, but cannot supply the want, of any other solemnity, required by law. And, previously to the introduction of the Slave Register, a notarial bond, specially mortgaging a slave, but not registered in the Debt Register, would have created no right of preference, whatever over that slave. (Cons. Brink v. Joubert, 2d June, 1829, *ante*, p. 371.)

The judgment of the Court therefore was, that Dawes, in respect of his notarial bond, and the Discount Bank, in respect of the registered promissory notes, or underhand obligations, held by them, are not entitled to any preference, on any part of the proceeds of the estate of the insolvent, and that both are to be ranked, in respect of such claims, as concurrent creditors, and that the Master be directed, to alter the scheme of distribution accordingly.

No costs.

In Re Insol-
vent estate of
London.
Discount
Bank
v.
Dawes.

HOLLET v. NISBET & DICKSON.

[16th September, 1829.]

Insurance—Contract when and how completed.

In this case, the plaintiff had brought an action, before the late Court of Justice, to compel the defendants to deliver to him, a policy of insurance, by the Star Insurance Company, Calcutta, for £900, on the cargo of the brig *Martha*, which it was admitted, had been made and signed, on the 18th September, 1826, by the defendants, as the authorised agents of the Star Insurance Company, in his favor, at the instance of his agent, Heyward. The plaintiff, on delivery thereof, tendering payment of the premium, alleged to have been agreed on.

Hollet
v.
Nisbet &
Dickson.

Intelligence of the loss of the brig and cargo, had been received in Cape Town, on the 3d October, 1826.

After evidence had been led, by both parties, the late Court, on the 26th July, 1827, gave judgment, in favor of the defendants.

Against this judgment, the plaintiff appealed, for the following reasons:

1st. Because the risk was accepted by the defendants, and the amount of the premium paid, or settled in account, by the plaintiff.

2d. Because the risk having been accepted, it is immaterial, whether the amount of the premium, was settled or not.

In support of the judgment, the defendants stated the following reasons:

1st. That the contract was not finally closed, so as to make it mutually binding, on both parties.

2d. Because the premium not having been paid, nor credit given for its amount, the defendants can as little be compelled to deliver a policy, which they have in readiness, but still in their own possession, undelivered, as they could have been compelled, to make out and sign such a policy for the plaintiff, supposing they had not done that yet.

Hollet
v.
Nisbet &
Dickson.

After hearing the counsel of both parties, in support of and against the appeal, the *Court found*, that the following facts, had been proved, by the evidence in the case:

1st. That the plaintiff, by a letter, dated 7th September, 1826, addressed to Heyward, gave him unqualified instructions as his agent, to insure a cargo of wood, value £900, on board the brig *Martha*, then in Mossel Bay, from that date, till delivery in Table Bay, with the defendants, the agents of the Star Insurance Company, on the best terms he could;

2d. That the defendants had in September, 1826, authority from the Star Insurance Company, to underwrite on their account, such sea risks, as they should think fit, and execute for the company, regular policies of insurance;

3d. That on the 15th September, 1826, Heyward accordingly, as the plaintiff's agent, proposed to the defendants, as the agents for the Star Insurance Company, to insure £900 on the said cargo on the said voyage, and that on the same day, the defendants agreed to effect such insurance;

4th. That it was there and then expressly agreed upon, between the plaintiff and the defendants, that this premium should be 3 per cent., and that fourteen days should be allowed, for delivery in Table Bay;

5th. That there was then and there, an implied agreement between the parties, that all the other conditions of the insurance, should be those, usually stipulated by the Star Insurance Company, in policies against sea risks, on coasting voyages, from one port to another of this colony;

6th. That it has neither been proved, nor alleged, that it was the custom of the Star Insurance Company, to make any *special* stipulations, as to the time, or manner of payment, of the premium of such policies;

7th. That on the said 15th September, there were no *special* conditions, as to the time and manner, of the payment of the premium, agreed on between the plaintiffs and the defendants, either expressly or by implication;

8th. That on the said 15th September, the defendant Nisbet wrote, on plaintiff's said letter to Heyward, "accepted, premium 3 per cent., fourteen days allowed for delivery in Table Bay," that this letter so indorsed, was then redelivered to Heyward by Nisbet, who undertook to have a regular policy of the insurance executed;

9th. That on the 18th of September, being the third day after the defendants had agreed, to insure the cargo on the above conditions, they made out and signed, a regular policy of such insurance, in the name and on account of the Star Insurance Company; which policy, in the usual terms, acknowledged, the receipt of the premium, and provided, that the adjustment of all average losses, and other matters relating

to this insurance, shall be made by the agents of the company in London, agreeable to the tenor of the policy, and according to the established practice, in such cases;

Hollet
v.
Nisbet &
Dickson.

10th. That on the 3d October, 1826, when the intelligence of the loss, of the brig *Martha* and cargo, reached Cape Town, the said policy of insurance, remained undelivered, in the possession of the defendants;

11th. That on the said 3d of October, the premium on the said insurance, had not been *paid* in cash, or otherwise, to the defendants, either by the plaintiff or his agent Heyward, and that no settlement of accounts, had taken place between any of those parties, during this period, between the said 15th September and 3d October;

12th. That prior to the 15th September, and subsequently to the 3d October, Heyward was empowered by a power of attorney, from one E. Durham, then absent from the colony, to manage all his (Durham's) concerns here, to demand and receive payment of all debts due to him, and to discharge the same;

13th. That between the 18th of September, (the date of the policy,) and the 30th September, Heyward, as agent for Durham, delivered to the defendants, a copy of an open account between them and Durham, and requested them to examine it, and ascertain the real balance, which he was unable to do, Durham's books not having been written up, and that this account was received by, and left with the defendant Dickson, for that purpose;

14th. That the defendants had it in their power, to have ascertained the state of this balance, but there is no evidence, whether they did or did not do so, prior to the said 3d of October, and if ascertained by them, it was not communicated to Heyward before that date;

15th. That the balance of said account, was, prior to the said 15th September, and continued to be, subsequently to said 3d of October, £39 2s. 7½d., in favour of Durham;

16th. That between the said 15th September and 3d October, Heyward, as agent for Durham, was entitled to demand and receive from the defendants, said balance of £39 2s. 7½d., and that the defendants were entitled, to demand and receive from Heyward, as the agent of the plaintiff, £27, being the amount of the premium of insurance;

17th. That Heyward presented the said account to the defendants, at the time aforesaid, for the purpose of procuring the immediate settlement, and payment of said balance;

18th. That there is not sufficient evidence, to prove, that Heyward ever expressly offered to the defendants, to pay or receive the difference, between the sum due as the balance of said account, and that due for the said premium, but that it is

Hollet
v.
Nisbet &
Dickson.

proved, that it was his intention, to settle such difference, whatever it might be, in this manner;

19th. That there is not sufficient evidence, to prove, that the policy of insurance, was, prior to said 3d of October, tendered to Heyward, and payment of the premium demanded from him, by or on the part of the defendants;—but that it is proved, that the defendants intended, that such tender and demand should have been made, and that it was only prevented from being made, by the defendant's clerks, who were sent for this purpose, not having been able to meet Heyward;

20th. That it was not, until several days after the 18th September, when the policy had been signed, that the defendants first resolved, to make such tender and demand, and they have admitted, that the cause of their adopting this resolution, was not any doubt, as to the solvency of either Heyward or the plaintiff, for the amount of the premium, but a suspicion arising, for the first time, some days after the policy had been signed, that in the event, of the safe arrival of the brig and cargo, it might be impossible for them, to recover the premium, in consequence of their having no positive proof, that Heyward had agreed, to effect the insurance on the terms above stated;

21st. That it is proved, by the admission of the defendant Nisbet, the partner, who accepted Heyward's proposal to effect the insurance, that he considered the contract between the parties perfected, at least after the execution of the policy, and that he would accordingly have demanded payment of the premium, although the vessel and cargo had previously arrived in safety.

In respect of the above facts, the *judgment of the Court* was,

That the sentence of the late Court of Justice appealed from be reversed; that the defendants be merely decreed to receive from the plaintiff £27, as the premium of insurance on the policy in question, and to grant him a receipt for the same; that upon production of such receipt, to the Registrar of Court, the Registrar shall deliver up to the plaintiff the said policy, which had been produced, and filed by the defendants, in the course of the proceedings, in the late Court of Justice; and that the defendants do pay the plaintiff's costs, both of the action before the late Court, and of this appeal.

The grounds, on which this judgment was given, were, that the Court held?

That there is nothing, in the nature of the contract of insurance, which can make the previous payment of the premium, absolutely essential, to the constitution of the obligation of the insurer, or which necessarily suspends that obligation, until

the premium is paid. Van der Linden's Inst., b. 4, c. 6, § 1, p. 645 (Eng. ed.); Pothier, Contr. of Ins., c. 1, S. 1, n. 2.

Accordingly it is declared, by the authorities in the Dutch law, that "although this transaction, is properly one of those, which are perfect by mutual consent, and is valid, although the premium be not yet paid, the law nevertheless provides, that the written memorandum of agreement, respecting insurance, shall not be good beyond fourteen days, and that within this time, the agreement shall be drawn out, on a proper stamped policy." Van der Linden's Inst., 4, ch. 6, § 7, p. 654 (Eng. ed.); Van der Keessel Thes., 713, 729.

And in the law of England, when by virtue of the Stamp Acts, no contract of insurance can be given in evidence, or is good or available in law, unless written or printed on paper, previously stamped, with a certain stamp, it is stated by all the authorities, that the policy of insurance, "*is a written instrument, by which the contract of insurance is effected.*" Marshall on Insurance, b. 1, c. 8, § 1 and § 2.

And it has been decided, that authority to a broker to effect an insurance, may be revoked by the intending insurer, although a slip has been signed, so long as the stamped policy, has not been subscribed, but not after it has been so subscribed, whether the premium have, or have not been paid by the insured, or been received by the insurance. *Vide* Marshall, b. 1, c. 8, § 3.

In this case, the proper legal policy was made out and signed, within three days, after the memorandum of the agreement for the insurance, had been endorsed by the defendants, on plaintiff's letter to Heyward. There is therefore nothing, in the law of Holland, or of this colony, which can in any way affect, the validity of the consensual contract, entered into on the 15th September, between the plaintiff and the defendants, and finally perfected on the 18th, by the execution of the policy. From the instant, this consensual contract was entered into, either party, on tendering performance of the obligation, incumbent on him, could compel the other, to perform the obligation, incumbent on the latter; the mutual obligations of the contract, became reciprocally binding on the parties, the instant the contract was perfected, and could not be afterwards annulled or impaired, by any subsequent event, either by the arrival in safety, or by the loss, of the property insured.

It has not been proved, that payment of the premium, was demanded by the defendants, and refused by the plaintiff, and in this action, in which he only demands delivery of the policy, he has tendered payment of the premium.

On these grounds, supposing it had been found, by the same evidence as in this case, that the agreement had been entered into, between Heyward and the Star Insurance Company,

Hollet
v.
Niabet &
Dickson.

Hollet
v.
Nisbet &
Dickson.

without the intervention of the defendants, in the same way, in which it has been proved to have been entered into, by him with them, and that the policy were still in the actual possession of the Company, or had not been executed by them, the *Court held*, that the plaintiff, on tendering the premium, would have been entitled, to compel the Company, to deliver the existing policy, or, provided his action had been commenced, within fourteen days after the agreement was entered into, to execute and deliver a policy, in the same terms; and *a fortiori*, he is entitled to demand delivery of it, from the defendants, a third party, in whose possession it is.

It is laid down as law by every authority that, when the policy has been subscribed, without payment of a stipulation as to the payment of the premium, credit must be held to have been given for the premium, and that the policy when effected, becomes the property of the insured in whose hands soever it may happen to be, subject however to any equitable lien which the holder may have on it, and that if it be wrongfully withheld the insured may maintain an action for its recovery. Marshall, b. 1, 8, § 2; Van der Linden, b. 4, c. 6, § 6, p. 653, Eng. ed.

The only lien, which the defendants could pretend to have over the policy, is for the premium for which they are liable to the Star Insurance Company, but the plaintiff has tendered to them the premium on their delivering the policy.

By the law both of England and Holland, the insurer, when the insurance is effected by a broker or agent, must look to, and has his remedy for the premium against, the agent or broker alone, except in certain specified cases. Marshall, 1, 8, § 3, No. 7; 1, 8, § 2; 1, 16; § 5, No. 3. Van der Linden, b. 4, c. 6, § 6, p. 653, Eng. ed.

Therefore if Heyward be considered to have been the agent or broker through whom the insurance was effected, the Company and their agents the defendants, must be held to have given credit to Heyward for the premium, and more especially must the latter, be held to have done so in consequence of the open account between them and him as the agent of Durham, while they retained the policy as a security for the payment of the premium for which they gave credit.

The case for the plaintiff is still stronger, if the defendants are to be deemed to have been *the brokers*, by whom the contract of insurance between the plaintiff and the Star Insurance Company was effected, and Heyward merely the plaintiff's correspondent and agent, which appeared to the Court to be their proper characters. *Vide* Marshall, 1, 8, § 2.

For in this view of the case, the instant the policy was signed by the defendants, the brokers, they became liable to the Star Insurance, for the premium which they must have paid to

the Company, although the plaintiff and Heyward had become insolvent, or, in consequence of the safe arrival of the brig before delivery of the policy, had refused to pay the premium.

The instant the policy was signed by the defendants, the brokers, the Company ceased to have any right to the policy which had become the absolute property of the plaintiff, and *was held by the defendants for him*, subject only to a lien *in their favor*, until he should pay to them the premium which he now tenders.

The Star Insurance Company, who, by employing the defendants as their brokers, gave credit to them for all the premiums on policies which they might procure for them, and who by subscribing the policy (whether by their own hands or by those of their brokers whom they had authorised to underwrite for them is of no consequence) perfected the contract, could not afterwards have claimed any right in or lien over the policy while still in the possession of the defendants, the brokers, and much less can the defendants maintain any such claim on behalf of the Company.

Hollet
v.
Nisbet &
Dickson.

DIETZ v. POHL.

[10th Sept., 1829.]

Award,—set aside—for certain informalities and irregularities, in the appointment of Umpire, and in the hearing of the Case, in the absence of one of the parties.

Dietz, on the 18th June, obtained a rule upon Pohl, to show cause, why a certain award, between the parties, which had been made a rule of Court, and in which execution had been taken out, and the writ of execution issued thereon, should not be set aside.

Dietz
v.
Pohl.

Joubert, for Dietz, moved, to have the award set aside on these grounds:—

1st. That the award, had been made a rule of Court, without notice given to Dietz, of any intention, to apply to have that done, and further, that Dietz had no knowledge, that any final award had been made, until he was served with the writ of execution, and that the deed of submission, contained no clause, authorising the award, to be made a rule of Court, without the knowledge and consent of both parties. In support of these averments, he produced affidavits, by Dietz, Silberbauer and attorney Merrington, which proved the facts alleged.

2dly. That the deed of submission, contained a clause, that the arbitrators, should have a power of assumption, in case of difference of opinion.

Dietz appointed Stone, and Pohl appointed Letham.

Dietz
v.
Pohl.

These arbitrators, not being able to agree, appointed Knobel as umpire, who kept the papers for two years, and then wrote a letter to Dietz, stating, that nothing had been done by him, because nothing had been done by the arbitrators, and that he had not had two opinions, to decide between, but had the whole case to go over, in order to form his opinion, which he could not do, without further information.

It was admitted by both parties, that Knobel afterwards resigned his office of umpire, and surrendered the papers, without giving any decision.

Of this date, (11th August, 1828,) the original arbitrators, not being able to agree, executed a deed, appointing Brown umpire. This was done, without the consent of Dietz, on which ground, he maintained, that this appointment was null.

Brown, without either calling on Dietz, or consulting with his arbitrator Stone, but having merely consulted with Letham, Pohl's arbitrator, pronounced his award, on the 23d August, 1828, having previously, on the 17th of August, received a letter from Stone, informing him, that Dietz's papers would be sent to him. But the award was made, before the papers were delivered. This was proved, by affidavits of Stone and his brother, who swore, that on his brother having informed Letham, that he had received some papers, to be delivered to Brown, he was told by Letham, that they had done without them, that the business was all over, that he and Brown, had sat up till 12 o'clock at night, and settled the business, and that it was all sent off to Cape Town.

Further, in the award, one of Dietz's claims, is stated to be rejected, for want of proof, while the documents, by which it was supported, were among the papers, which were to have been delivered to Brown, but before receiving which, the award had been pronounced.

Cloete, for Pohl, argued *contra*.

The *Court held*, that the award must be set aside, and all that had followed thereon. (*Vide Voet* 4: 8, 13; *Van Leeuwen*, *Cens. For.*, pars. 2, lib. 1, c. 17, § 10.)

Rule made absolute, with costs.

GUTHRIE v. MUNTINGH.

[18th September, 1829.]

1. *Shipping*.—*The Owner of a Vessel is bound by the Master's Contract.*

2. *Seamen's Wages*,—*when not affected by the loss of the Ship.*

3. *The failure of undertaking, without the fault of the person employed, does not affect his Wages.*

The plaintiff was engaged, as second master and sealer, of the ship *Duke of Gloucester*, of which, the defendant was the managing owner, for a sealing voyage. After sealing some time, the vessel went to Inaccessible Island, where the master engaged the plaintiff, and other five of the crew, to remain on the island, and seal, promising to return for them, at the end of three months, and that the plaintiff should be paid wages, at the rate of Rds. 35 per month, and receive besides Rds. 4 for every leaguer of oil made, and two skillings for each seal skin procured.

Guthrie
v.
Muntingh.

The *Duke of Gloucester* then left the island, and returned to Table Bay, from whence she was afterwards despatched to Inaccessible Island, which she never reached, and was never more heard of.

The plaintiff and the other men, remained fifteen months and twenty days on the island, when they were taken by the *Good Intent*, a small schooner, sent for that purpose by the defendant, which reached the island after a very long voyage, having, after first getting in sight of the island, been blown off, without being able to communicate with it, and to return to Table Bay, to refit and revictual. (*Vide Deane & Luck v. Muntingh*, 7th January, 1829, *supra* p. 346.)

During this time, the plaintiff and his companions, had made 19½ tons of oil, and procured 233 seal skins. The schooner was not large enough, to have brought away, more than 8 tons of oil, and in fact, was prevented by bad weather, from getting off any of the oil or skins.

The plaintiff brought this action, to recover from the defendant, *inter alia*, Rds. 750, as his wages, for the 15 months and 20 days, during which he had been on the island, and the stipulated allowance, for the 19½ tons of oil and 233 skins, which had been made and procured.

The defendant objected to the plaintiff's claim :

1st. That he was not bound by the agreement, which the master of the *Duke of Gloucester*, had made with the plaintiff.

2dly. That even if he was, the loss of the *Duke of Gloucester*, put an end to the agreement, and to all claims by the plaintiff, under the agreement.

3dly. That the defendant, not having got, either the oil or the skins, in consequence of the loss of the *Duke of Gloucester*, and the bad weather, which prevented the *Good Intent*, from bringing them away, was not liable, to pay anything to the plaintiff, on account of the oil or skins.

Guthrie
v.
Muntingh.

1. The *Court held*, that the defendant was bound, by the agreement made with the plaintiff, by the master of the ship.*

2. That this agreement was not put an end to, by the loss of the *Duke of Gloucester*, because, in the first place, the original voyage, which was the subject of the plaintiff's engagement with the defendant, as one of the crew, was performed and completed, when that ship returned to Table Bay; and that her loss on a new voyage, entered upon, subsequent to the agreement, made with the plaintiff by the master, at Inaccessible Island, could not affect that agreement.

Secondly: Because this agreement, put an end to the plaintiff's original engagement, as one of the crew of the *Duke of Gloucester*, and did not connect the plaintiff, with any particular ship. The defendant might, under the agreement, have sent any other ship, than the *Duke of Gloucester*, although she had not been lost, to bring off the plaintiff, and the produce of his labour. It only bound the defendant, to send some vessel, to take them off. Consequently, the loss of any particular ship, sent out by the defendant, for this purpose, but lost, before she had taken them off, could not affect the plaintiff's claim, under the agreement.

3. Lastly. That as it was not the fault of the plaintiff, nor in any way owing to him, that the defendant has not yet received, the oil and the skins, which the plaintiff had prepared, and had ready for him at the place, to which it was stipulated, that the defendant should send for them, this fact cannot deprive the plaintiff, of his claim for remuneration, for having prepared them.

The *Court* therefore gave *judgment* for the plaintiff, for the sum claimed, with interest, from the date of the return of the summons, and costs.

HEARTLEY v. POUPART, ATTORNEY OF MCCOY.

[24th September, 1829.]

"Mandatum"—ceases *"morte mandantis."*—*Proceedings, in name of a dead person, after death, null, and set aside.*

Costs—of Attorney, for proceeding in the name of a dead party, not allowed.

Heartley v.
Poupart,
Attorney of
McCoy.

The applicant, had obtained a rule, calling on the respondent, to show cause, why the sentence of the Supreme Court of 31st March, 1829, and the writ of execution, which

* *Cona. Voet de Exercit. act. 14: 1, 3; Barels Adv. over Koophandel, vol. 1, Adv. 11, p. 53.—[Ed.]*

had followed thereon, should not be set aside, and the money, levied under the writ, repaid, in respect, that at the time when the summons was taken out, in the name of McCoy, McCoy had been dead for some months, and consequently, that the decree, and all which had followed thereon, was null.

Heartley
v.
Poupart,
Attorney of
McCoy.

It appeared, that the summons had been taken out, after the death of McCoy, had been notified in the Cape newspapers, and the writ of execution, after the death had been notified in the *Gazette*.

The Court held, that the proceedings, could not be sustained, either as regarded the debt,—or in favor of the attorney, in so far, as regarded the costs,—and that it was therefore unnecessary, to decide, what would have been the law, if the attorney could have pleaded, that the death of McCoy, was not known to him, when he obtained the decree and writ of execution.*

Ordered, that the decree and writ of execution be set aside. Money levied to be repaid, with costs.

LOW v. SPENGLER.

[29th Sept., 1829.]

Surety—having renounced the “Beneficium excussionis,” whether discharged, by the Creditors giving up a “pignus pretorium,” obtained from the Debtor.

This action was brought by the plaintiff, to recover from the defendant, payment of a bond, for Rds. 2000, made in favor of the plaintiff, by Niekerk, who had since been rendered insolvent, and out of whose estate, nothing had been awarded, on account of this bond, in which the defendant had bound himself *in solidum*, as surety and co-principal debtor, under renunciation of the *beneficia ordinis et excussionis*.

Low
v.
Spengler.

In defence against this claim, the defendant, *inter alia*, pleaded, that he was discharged, by reason, that the plaintiff, who had obtained a sentence against it, and lodged it for execution with the Sequestrator,—to whom Niekerk in his return, gave up 100 oxen as a security, for the discharge of the said sentence,—afterwards, by instruction to the Sequestrator, gave a respite to Niekerk, in consequence of which respite, the *pignus pretorium*, which had been constituted on those oxen, became ineffectual, and was lost.

* Ad h. Quest. consul. Van der Linden, Jud. Praktyk, lib. 2, c. 14, § 1; Gul. Grotius Jaasoge ad Praxin, lib. 2, c. 4, § 7, in nota; Voet 3: 3, 10, 13; 17: 1, 15, et 5: 1, 32 et 33, *ibiq.* Van der Linden Supplem.; Merula, Manier van Procceederen, lib. 4, tit. 83, c. 4 et 5, *ibiq.* De Haas et Van der Linden.—[Ed.]

Low
v.
Spengler.

After hearing the evidence of the witnesses, called by both parties, the *Court held*, that it had not been proved, that any effectual *pignus, vel pretorium vel judiciali*, had even been constituted, in security of the plaintiff's sentence, against Niekerk, over any part of Niekerk's property; consequently, that this defence, must be repelled on that ground alone, and that it was therefore unnecessary to decide, what would have been the effect in law, of the plaintiff's conduct, in granting a delay of execution, if a valid *pignus pretorium vel judiciali*, had previously been constituted in his favor; and gave judgment for the plaintiff, with costs.

EX-PARTE MUNNIK.

[13th October, 5th December, 1829.]

Attorney—a Notary who was not entitled to Practice as such, at the date of the Charter (1827), not admissible, as an Attorney of the Supreme Court, under the 21st Section of said Charter.

Ex parte
Munnik.
13th October.

Cloete, for the applicant, maintained, that he was qualified, to be admitted as an attorney, as having been entitled, to practice as a notary, in the late Court, at the date of the Charter, and referred to the 195th article, of the Instructions, for the country districts, page 756, and the Book of Oaths, kept by the late Court, page 89.

The *Court were of opinion*, that the applicant, had not sufficiently shown, that he was entitled, to practice as a notary, in August, 1827, and therefore refused the application, for the present.

5th Dec.

Cloete renewed the application, but merely repeated his former arguments, and quoted Voet 1: 14 § 7.

Application refused, and Mr. Munnik ordered, to be struck off the roll.

THOMSON & CO. v. ARCHER.

[1st December, 1829.]

Bill of Exchange,—presentment for Payment, to Insolvent Acceptor, necessary against Drawer.

Thomson & Co.
v.
Archer.

The sequestration, of the acceptor, as insolvent, before the day of payment, was held by the Court, not to obviate, the necessity, of presentment for payment, to entitle the holder, to recover from drawer. (*Vide* Van der Linden, b. 4, c. 7, § xi., p. 685, Eng. ed.; Chitty on Bills, p. 316; add. Thomson & Co. v. Archer, *ante* p. 61.)

SCHUTTE *v.* WYLDE.

[1st December, 1829.]

Summons expired, by reason of Plaintiff not appearing, on the day, for which case was allowed to stand over;—not curable by mere Notice.

The plaintiff summoned the defendant, to show cause, on the 4th September, 1828, why decree of civil imprisonment, should not be given against him.

Schutte
v.
Wylde.

On that day, both parties appeared.

The case was allowed, to stand over for a week, in order, that parties might endeavour, to come to an arrangement.

On the 11th September, the defendant appeared in Court, but the plaintiff not appearing, nothing was done, and no order was made.

On the 1st December, the plaintiff served the defendant with a notice, to appear in Court, to answer to the former summons.

The Court held, that the force of that summons, was expired, and that a mere notice, was incompetent, and that the defendant, could not be called on, except by a fresh summons.

HORN *v.* LOEDOLFF ET UXOR.

[12th January, 1830.]

1. *Pleading—under general plea of nihil debit, what special defence not pleadable.*
2. *Surety—when not released, by reason of another interposing in his stead, but not having signed the undertaking.*
3. *Estate—Non-lodgment of a Claim, in the Estate of a Deceased person, no bar, to claiming from Executor, still having Assets.*
4. *Cession of Action—not necessary to be offered, in Summons or Declaration.*

This action was brought, to recover from the defendant, as being married, in community of property, to the executrix of Roussouw, payment of a bond, of which the plaintiff was the legal holder, by assignation. The bond was granted by Hendrik C. van Niekerk, as principal debtor, and by the deceased Gabriel Roussouw, and the widow Niekerk, as sureties and co-principal debtors; and at the end of the bond, there was a clause, purporting to be signed by M. Melk.

Horn
v.
Loedolff
et Uxor.

Horn
v.
Loedolff
et Uxor.

"The subscriber declares, to interpose himself *in solidum* for, and in the place of the widow Niekerk, as co-surety, under the renunciation as above-mentioned, and under obligation according to law."

The defendant's plea, merely stated, "that he does not owe the sum demanded, or any part thereof, and that the writing obligatory, alleged to have been signed by G. Roussouw, was not the deed of the said G. Roussouw."

After evidence had been led, by both parties, by which the *Court held*, it had been proved, that the signature of G. Roussouw to the bond was genuine, and that it had not been proved, that Melk had ever signed the clause, at the end of the bond, purporting to have been signed by him;

Joubert, for the defendant, maintained, 1st, that the clause, purporting to be signed by Melk, had the effect in law, of releasing the widow Niekerk, and that the original creditor, whose assignee the plaintiff was, having thus released the original co-surety of Roussouw, had discharged Roussouw, from all claim against him as surety.

2dly. That supposing, the release of the co-surety, had only discharged Roussouw, to the extent of one-half of the debt, for which he would otherwise have been liable *in solidum*, the plaintiff must be non-suited, because he had sued the defendant *in solidum*, and not for the half of the debt, for which he was liable.

3dly. That the plaintiff was barred, from now claiming payment of the bond, from the executrix of Roussouw, because a claim had not been entered, upon this bond, against Roussouw's estate, when the executrix had called on his creditors, to lodge their claims, by a publication in due form, by order of the Court, dated 7th August, 1823.

Lastly, That the plaintiff was bound, to have offered to the defendant, cession of action, in order to be entitled to make his claim, against the defendant, and although he had done this in the summons, this was not sufficient, it being necessary, that the offer should have been made, in the declaration.

Brand, for the plaintiff, *contra* maintained, and so

12th January,
1830.

1. The *Court held*, that the defendant, under his general plea, that he did not owe the sum demanded, or any part thereof, in manner and form as set forth, was not entitled, now, to maintain the special defences, which he had pleaded, and that to have entitled the defendant, to have maintained these defences, he was bound to have set them forth, and to have pleaded them specially in his plea.

2. He farther maintained, and so the *Court held*, that as Melk, had not signed the clause in the bond, and thus become co-surety, in place of the widow, she, the original co-surety, had not been released, and consequently, that the defence,

that the defendant had been discharged, by the release of his co-surety, had no foundation in fact.

3. He maintained, that the non-lodgment of their claims, by the creditors of a deceased person, in terms of the publication, made by the Court, at the instance of the executors, had repeatedly been decided, to be no bar to those creditors, claiming their debts afterwards from the executors, still having assets of the deceased in their hands.

The Court held it unnecessary, to decide this point, in this case. (*Vide* Executrix of Moore v. Le Sueur, 1st August, 1844.)

4. The Court held, that the plaintiff was not bound, to offer either in his declaration, or summons, cession of action to the defendant, it being sufficient, that he shall make such cession, on being thereunto required.

On these grounds, the Court gave judgment for the plaintiff, with costs.

Horn
v.
Loedolff
et Uxor.

DE WET v. CLOETE.

[3d December, 1829,—12th January, 1830.]

Servitude Aquæductus,—how constituted, against singular successor of Grantor.

Government,—how far “dominus fluminum,” and how far of rivulets.

In this action, the plaintiff claimed for his place *Rustenburg*, the undisturbed use of a right of servitude on a certain stream of water, which the defendant unlawfully obstructed, and converted to the use of his place *Schoongezigt*, contrary to the terms of an agreement, executed on the 15th April, 1811, made between the then proprietors of these two places, by which agreement, the servitude claimed, was constituted.

The facts of this case were, that, previously to 1810, *Schoongezigt* was a part of, and included in the place *Rustenburg*. In 1810, Eksteen, then proprietor of the united place, sold the part, called *Schoongezigt*, to his son-in-law, and thereafter, in the same year, sold the remainder, called *Rustenburg*, to Van der Byl.

Before the separation, the proprietor could water his vineyard in *Rustenburg*, with water, led from a dam, situated on *Schoongezigt*. After the separation, this dam was on *Schoongezigt*, and no water could be led from it, except by a water-course, running through the ground of *Schoongezigt*. Neither in the contract of sale, nor in the deed of transfer of *Schoongezigt*, by Eksteen to Brink, was any reservation, condition,

De Wet
v.
Cloete.

De Wet
v.
Cloete.

or servitude inserted, giving any right, to the owner of *Rustenburg*, to lead water from this dam on *Schoongezigt*. But on the 15th April, 1811, Brink, as owner of *Schoongezigt*, and Van der Byl, as owner of *Rustenburg*, appeared before the Secretary of the district, acting as a notary public, and declared, *as well for themselves, as for the future possessors of the respective places*, to have made the following agreement, viz., that the owner of *Rustenburg*, should have the free use, of a certain stream of water, from the dam on *Schoongezigt*, on certain days. This was the right of servitude, now claimed by the plaintiff.

On the 16th April, 1811, Brink sold *Schoongezigt* to H. Cloete, who swore, that until long after the sale and transfer to him, he had never been informed, of the agreement executed on the 15th April. But it was proved, that before the sale, he had seen the dam, and the stream running from it to *Rustenburg*. It did not appear, that he made any inquiries, as to the right of *Rustenburg* to this stream.

On the 10th June, 1811, Brink, by a notarial deed, appointed Andries Brink, his attorney, to appear for him, before the Commissioner for Transfer, to give transfer to H. Cloete, of *Schoongezigt*, sold to him, by private contract, dated 16th April, 1811, "and under all such conditions and terms, as the contracts, made in that behalf, and specially those, which the contract, passed by the appearer with Van der Byl, on the 15th April last, set forth."

On the 23d August, Andries Brink, as attorney aforesaid, appeared before the Commissioner, and transferred *Schoongezigt* to H. Cloete. The deed of transfer states, that Andries Brink was duly qualified to do so, "as appears from a special power of attorney, dated 1st June last."

But the deed of transfer then executed, made no mention whatever of, or reference to the agreement, of 15th April, 1811, or to any right of water, in favor of *Rustenburg*.

Sometime afterwards, H. Cloete entered into a treaty, to sell *Schoongezigt*, to De Villiers, who having seen the stream of water running to *Rustenburg*, and inquired respecting it, of Van der Byl's widow, then possessing *Rustenburg*, was shown by her, in presence of H. Cloete, the agreement of 15th April, 1811, and thereupon in consequence, broke off the sale.

In 1824, H. Cloete sold *Schoongezigt* to the defendant. The deed of transfer to him, dated 7th May, 1824, made no mention of, or reference to the agreement of 15th April, 1811. It did not appear, that the defendant, before the sale, had been informed, of the existence of the contract, but it was proved, he had previously seen the dam, and the water-course running to *Rustenburg*.

H. Cloete swore, that he had allowed Van der Byl, who was his brother-in-law, the use of the stream, in the same way Brink has done, because Brink had done so, and because he was on good terms with him, and not, because of the agreement of 15th April, 1811, which he did not consider binding.

De Wet
v.
Cloete.

The result of the evidence was, that up to November, 1828, when the interruptions, on the part of the defendant, which gave rise to this action, commenced, the possessors of *Rustenburg*, viz., 1st, Van der Byl, 2d, his widow, 3d, the plaintiff,—who had at first lived there as superintendent to the widow, and afterwards, on the 28th December, 1828, acquired the property,—had always enjoyed, the use of as much water, as they choose, without being obliged, to attempt to enforce the agreement of 15th April, 1811.

In 1806, Eksteen, as proprietor of the then united place *Schoongezigt* and *Rustenburg*, had entered into an obligation, to certain proprietors, of places situated lower down the stream, formed by the rivulets, running through *Schoongezigt* and *Rustenburg*, to allow them, the use of the water, running through these places, in a certain way, and at certain times, and bound himself, to pay a penalty, as often as he violated this obligation.

In 1818, Briers, one of the lower proprietors, sued, both Van der Byl as owner of *Rustenburg*, and H. Cloete as owner of *Schoongezigt*, for the penalties, stipulated for a breach of the obligation of 1806, before the Court of Landdrost and Heemraden, which condemned both of them, but only in one penalty, to be recovered *in solidum*, against one or other of the proprietors, and not from each, reserving to the proprietor, paying, his relief from his co-proprietor.

Both parties appealed to the late Court of Justice, which, 14th June, 1819, affirmed the sentence, with this further finding, “while further, in consequence of the existing doubtfulness, with regard to the said agreement of 1806, the Landdrost and Heemraden are recommended, as the magistrates of police of the district, to regulate in future, the further use of the water, in such manner, under the approbation of His Excellency the Governor, as thereby to prevent all opportunity, of going to law, and until such further regulations be established, the existing agreement is to continue in observance.”

The widow Van der Byl, acquiesced in this sentence, but H. Cloete appealed.

The sentence was affirmed, by the Court of Appeals, 17th February, 1821, and sent back to the Court, to be put in execution.

Thereafter, the Board of Landdrost and Heemraden, appointed two of their members, to inspect all the water-courses,

*De Wet
v.
Cloete.*

on 1st, *Kromme River*, 2d, *Great and Little Ida's Valley*, 3d, *Rustenburg*, 4th, *Schoongezigt*; and after receiving their report, drew up certain regulations, and transmitted them to the Court of Justice, by which they were transmitted to the Government, along with a letter, dated 8th September, 1822, in which, referring to the case, between Briers and H. Cloete, they state, that the Board of Landdrost and Heemraden, considered it necessary, to frame regulations, for the use of the water, not only for the said two persons, but also for the adjoining places, mentioned in the regulations, in order to prevent any difference in that respect in future, and establish a fixed rule, whereby any disputes might be decided; that these regulations, having been sent to the Court, had been by it approved, except, &c., &c., and seeing that these regulations, cannot bind the parties so long as they are not confirmed, by a legislative sanction, were for that purpose, presented to His Excellency.

These regulations were approved by the Government, on 21st February, 1826, and copies of the regulations and approval, were transmitted by the Board of Landdrost and Heemraden, to all the proprietors of the places, therein named.

These regulations were entitled, "Regulations, respecting the irrigation of the following places, according to the sentence of the Court of Justice, dated 14th June, 1819, confirmed by the Court of Appeal, dated 17th February, 1821: *Schoongezigt*, *Rustenburg*, *Great and Small Ida's Valley*, *Nazaret*, *Helderfontein*, and *Kromme River*;" and concluded with the following,—“thus done and decreed, by the Board of Landdrost and Heemraden, at Stellenbosch, 3d June, 1822, and confirmed by His Excellency the Governor, and Commander-in-Chief, on the 21st February, 1826.”

Both parties admitted that these regulations, were binding on both, and in so far as they went, must be held, to be the only rule, ascertaining and fixing the rights of the parties, to the water in question.

Denyssen, for the plaintiff, maintained, that the contract of 15th April, 1811, was a legal and valid contract,—that it was sufficient in law, to constitute a real servitude over *Schoongezigt*, in favor of *Rustenburg*, and was therefore binding, not only on Brink, who was one of the parties, who executed it, but also on all the succeeding proprietors of *Schoongezigt*, and quoted Van der Linden's Institutes, b. 1, c. 11, § 4, p. 169; Grotius in Dutch Consultations, vol. 3, part 2, cons. 316, p. 565; Institutes, 2: 3, § 4; Voet 8: 4, 1.

That the regulations, were not intended to, and did not, regulate any rights to the water, as between *Rustenburg* and *Schoongezigt*, but only as between them jointly, as one party, and the lower proprietors, as the other party; therefore, that

the contract of 15th April, 1811, must be held to be in full force, and must regulate the respective rights, of the plaintiff and the defendant; consequently, that the defendant, should be decreed, as prayed, to give effect to it in future.

De Wet
v.
Cloete.

Cloete, for the defendant, maintained, 1st, that he was not bound, by the contract of 15th April, 1811, because, although it might have been sufficient, to constitute a personal obligation, on Brink and his heirs, it was not sufficient, to constitute a real servitude, effectual, against third parties, afterwards acquiring right to *Schoongezigt*, in respect, *it was merely a notarial agreement*, and had not been executed *coram lege loci*, i.e., in the same way, in which, by law, transfers of land must be made, and real burdens on land created, and quoted Voet 1: 8, 20; 8: 4, 1; 41: 1, 38—41 incl.; Grotius Introd., *cum notis* Groenewegen, b. 2, c. 36, § 2, in nota 1; Van Leeuwen's Comment., b. 2, c. 19, § 2, p. 190; Van der Keessel, Thes. 369; Bynkershoek Quæst Jur. Priv., l. 2, c. 16, § 8; and produced records, from the registry office, proving, that as far back at least, as 1692, transfers of land, were in this colony, executed before Commissioners of the Court of Justice, in lieu of *schepenkennissen*.

2dly. That, although, if the personal obligation, created by the contract of 15th April, 1811, had been inserted, in the deeds of transfer, from Brink to H. Cloete, and from H. Cloete to the defendant, the defendant might have been bound by it, yet, as it had not been so inserted, it was not binding on him, and quoted Voet 8: 1, 6.

3dly. He maintained, that the object of the contract of 1811, was in its nature illegal, (he was understood to mean, because it prejudiced, the just rights of the lower proprietors,) and therefore, although it had been executed, with all the solemnities, required by law, it was not binding, and could not legally be enforced, and quoted Van Leeuwen's Commentaries, b. 2, c. 1, § 12, p. 105; l. 24, D. *de Servitut. praed. rustic.* (8. 3.)

Lastly. He maintained, that the regulations were intended to, and did, apply to and regulate the rights, of *all the proprietors of all the different places therein named*. That by the 1st article of the regulation, which provides, "All former regulations, respecting the irrigation of the aforesaid places, without distinction, by any Court prescribed, whether appearing in sentences or other documents, have ceased to exist,"—the contract of 15th April, 1811, and all other, respecting the irrigation of those places, have been annulled and set aside.

That by the 2d and 7th articles of the regulation, it is provided, that the proprietor of *Schoongezigt*, shall lead all the water, collected in the dam above mentioned, on *Schoongezigt*, down to the vineyard of *Schoongezigt*; which is in effect an

De Wet
v.
Tate.

express prohibition, that any part of it, shall at any place above the vineyard, be led off to *Rustenburg*; consequently, the defendant, even if he were willing, could not lawfully permit, any of the water, to be led off to *Rustenburg*, as claimed by the plaintiff, at a place which is higher, than the *Schoongezigt* vineyard, which would be to the injury of the lower proprietors, by giving *Rustenburg* the use of water, which ought to run to them. He also referred to articles 3, 8, 16, and 19, as supporting this argument, and quoted l. 24, D. *de Serv. praed. rust.* (8. 3), and maintained, that on this ground alone, he was entitled to judgment, in his favor.

The Court were *unanimously of opinion*, that the regulations, in so far as they went, must be deemed by the Court, to regulate the rights of the parties, to the use of the water in question, because, in the first place, both parties admitted this; secondly, because those regulations, had been made under, and by virtue and in execution of a judgment, of the late Court, affirmed in appeal, given in a cause, in which the plaintiff and the defendant were parties, and had afterwards, received, the legislative sanction of the Government.

Menzies, J., rested his opinion, on this point, on these grounds alone, and expressed no opinion, as to the validity of the other grounds, on which the other Judges, rested their opinions.

The Chief Justice also, founded his opinion, in favor of the validity of the regulations, on § 125 and 126, of the instruction for the Landdrosts, of the country districts.

Burton, J., and Kekewich, J., expressed an opinion, that, notwithstanding the *ex facie* absolute grant of any lands, once the property of Government, the Government remained *dominus fluminis*, and had the sole power from time to time, to regulate the use of the water, between all the parties, through whose lands the stream, naturally flowed, and that the servitude, alleged to have been granted, in the contract of 1811, so far as it was incompatible, with the exercise of this power by Government, was illegal.

Menzies, J., doubted, whether that, which might be law, as to *flumina*, must necessarily be deemed to apply, to small rivulets, fit to be used only for irrigation.

The Court held *unanimously*, that the regulations were intended, to settle all and every the rights, or rights to, and the use of the water, therein mentioned, by all the places, therein specified, and not merely the question, as between the proprietors of *Schoongezigt* and *Rustenburg*, as the party on the one side, and the lower proprietors on the other part; and that the regulations were so worded, as to carry this intention into effect; that whether the contract of 15th April, 1811, be or be not, considered to be expressly put an end to,

by article 1, yet that the terms of articles 2 and 7, (corroborated by articles 3, 5, 8,) are sufficient, to exclude, and do exclude, the proprietor of *Rustenburg*, from any use of the water, collected in the abovementioned *Schoongezigt* dam, until after it shall have been led down, below the vineyard of *Schoongezigt*, and consequently to bar the plaintiff's claim in the action; and on these grounds, gave judgment for the defendant, with costs.

Det Wet
v.
Cloete.

The Court, having decided this case on the grounds above set forth, abstained from giving any decision, on any of the other questions of law, which had been raised.

HANEKOM'S TRUSTEE v. KOTZE.

[5th December, 1829.]

Slaves—Registration necessary, to transfer property of Slaves.

Proclamation of 20th April, 1816, and 30th January, 1818.

On the 3d February, 1826, Hanekom mortgaged his slaves *Rasia* and *Jamia*, then registered in the Slave Register, as his property, to *Horak*. This mortgage was duly registered. Hanekom became insolvent, and his estate was placed under sequestration. The trustee in his estate, obtained a rule on *Kotze*, who was in possession of those two slaves, to show cause, why he should not deliver them up to the trustee, in order to be sold, as part of the assets of the insolvent estate.

Hanekom's
Trustee
v.
Kotze.

Kotze contra maintained, that he had a right to keep those slaves, in respect of a sale of them, alleged to have been made by Hanekom to him, in the beginning of 1826, and produced a receipt, dated May, 1826, for a great part of the price. The transfer of those slaves to *Kotze*, in virtue of this contract, (if it had been made,) had not been registered, in the Slave Register. The Court, in respect of the Proclamation of the 20th April, 1816, § *ult.*, and of the Proclamation of 30th January, 1818, *held*, that the claim set up by *Kotze*, was not sufficient, to entitle him, to keep possession of the slaves, who were entered on the Register, as the property of the insolvent, against the trustee, and made the rule absolute, for the delivery of the slaves to the trustee.

TENNANT q.q. HOME v. SUTHERLAND.

[10th December, 1829.]

1 & 2. *Commission—what rate chargeable by Mercantile Agent, and when.*

3 & 4. *Exchange—what rate of—chargeable, and when.*

Tennant q.q.
Home,
v.
Sutherland.

In deciding this case, which was an action of accounting, between the plaintiff, a merchant in London, who had employed the defendant as his agent here, to recover debts due to him in this colony, the *Court*, after the examination of a great many of the principal merchants, in Cape Town, *held*,

1st. That no established usage, by which the rate of commission, to be charged by Cape merchants, for the recovery of money in this colony, for constituents out of the colony, is invariably regulated or fixed, has been proved to exist.

Therefore, that the *Court* must fix the rate, to be charged in this case, according to what appears, to be a fair remuneration, for the labour, bestowed by the defendant, in recovering the money, which he succeeded in recovering, for the plaintiff.

The *Court held*, that to be a fair remuneration for such labour, which respectable merchants, have, in the course of their business, been in the habit of charging, and their constituents, of allowing to them, in similar cases.

The *Court held*, that the result of the evidence, of the different witnesses, showed, that $2\frac{1}{2}$ per cent., is the rate of commission, usually charged, where the agent has little or nothing to do, except receive the money, from his constituent's debtor; and that 5 per cent., is the rate, usually charged, where the recovery of the money, has been attended with much trouble, either in adjusting the amount, or in procuring payment.

The *Court held*, it had been proved, that the regulations of the Commercial Exchange, in Cape Town, as to charging 5 per cent., have never been received, or acted on, as a rule in such cases.

2d. The *Court held*, that in the general case, the rule is, that it is the recovery of the money, that founds the claim for commission, and that when nothing is recovered, no commission is due. But the *Court held*, that this rule, strictly applies only, where the agent is not interrupted, in the course of recovering the money, by his constituent, and that there may be cases, in which the agent, will be entitled to insist, on being allowed to finish the transaction, or else to charge some commission, for what he has already done. Suppose a case in which, after much trouble, and legal proceedings, an agent

had obtained from his constituent's debtor, a bill for the amount of the debt, which perhaps, although not a liquid, and immediately negotiable instrument, is one, which there is reason to presume, will be paid when due, and on the amount of which, if the agency were not withdrawn, the agent, after receiving payment of it, and handing over the money, to his constituent, would be entitled, to charge 5 per cent., and that the constituent, under these circumstances, chooses to change his agent, and to direct this bill, to be handed over by the original agent, to the new one, who will necessarily have nothing to do, but ask for and receive payment, of the bill when due, and will be entitled to charge only $2\frac{1}{2}$ per cent. Unless a commission of $2\frac{1}{2}$ per cent., is allowed to the original agent, on the withdrawal of the agency, the constituent would enjoy the result, of the agent's trouble and labour, without paying for it, and the agent, would receive no remuneration, for that trouble and labour, by means of which alone, the debt has been recovered. In such cases, the *Court held*, that the agent, must either be allowed to retain the bill, finish the transaction, by receiving payment of it, and paying over the amount to the constituent, and charge the full commission of 5 per cent., or be entitled to claim and recover $2\frac{1}{2}$ commission, on delivering over this bill.

Tennant q.q.
Home
v.
Sutherland.

The *Court held*, that where, when the agency is withdrawn, the agent is in possession of liquid negotiable documents of debt, obtained by him from his constituent's debtor, he is entitled to insist, that the constituent, shall either take those documents as cash, and pay him the full commission, which he would be entitled to, on paying that particular amount in cash, and close the transaction,—or shall allow the agent, to retain the documents, and finish the transaction, by converting them into cash, and paying it over to the constituent, charging his full commission thereon.

But where, when the agency is withdrawn, the agent is in possession of documents, obtained by him from the constituent's debtor, whether with or without trouble, but which, owing to the debtor's insolvency, embarrassment, or other circumstances, there is reason to believe, will prove worthless, or at least, of the ultimate payment of which, there is only a very doubtful prospect,—the *Court held*, that the agent cannot insist, on the constituent's taking them over as cash, and that, whether he may be entitled to insist, on returning those documents, in order to attempt to make something of them, and charge commission on the proceeds thereof, when recovered;—or is bound, to give them up, with or without a reservation, for a claim for commission, on the proceeds, in the event of their ultimately producing anything,—he is not entitled, to retain as commission, in respect of those documents,

Tennant & Co. or on the debt, on account of which he obtained them, any
 Home part of the funds of his constituent, which he may have in his
 Sutherland possession, even although, he should offer security to refund
 such commission, in the event of nothing being recovered on
 those documents, within a certain time.

31. The *Court held*, that it had been proved, to be the established usage of the colony, for the agent, to charge his constituent, with the rate of exchange, payable within this colony at the time, for Treasury Bills, on all sums, received by the agent here, in the currency of this colony, the amount of which, is tendered in London, in sterling money to the constituent, at a period, as early, as the Treasury Bills could have been negotiated by the constituent, without reference to the particular mode of remittance, by which the agent has made the remittance;—that the usage is consistent with the general usage of merchants, at places east of the Cape, and with equitable principles.

4th. The *Court held*, that it had been proved to be the usage of merchants here, to charge 1 per cent., on all sums, received by them in cash here, and remitted by bills to their constituents in England, and that this was a fair charge, for the agent's trouble, in negotiating the bill transaction.

On these principles the *Court decided* the various questions, at issue, between the parties in this case.

IN RE INSOLVENT ESTATE OF DE VILLIERS.

DE VILLIERS v. CAUVIN AND SEQUESTRATOR.

[12th January, 1830.]

Rehabilitation,—what effect of, on previous property, not disposed of by Distribution Account. “Curia,” by majority, awarded it to the Creditors.

In Re Insol-
 vent estate
 of De Villiers.
 De Villiers
 v.
 Cauvin and
 Sequestrator.

De Villiers surrendered his estate in 1822, and, *inter alia*, gave up a schepenkennis, due to him by Hoffman. At the time, the scheme of distribution, of De Villiers' estate, was made out, this bond was not due; but before De Villiers was rehabilitated, Hoffman had also surrendered his estate, and a claim had been entered on his estate, in respect of this bond. In 1824, the scheme of distribution, of De Villiers' estate, was confirmed. In 1826, De Villiers, by the consent of his creditors, was rehabilitated, and the sequestrator handed over to him, all the documents, connected with his estate, and outstanding debts, and, *inter alia*, this bond. In the scheme of distribution, of Hoffman's estate, £112 was unexpectedly awarded in

1828, to this bond. De Villiers claimed this sum. On the 28th September, 1829, the following order was pronounced: "Upon reading the report of the Master, it is ordered, that the account be confirmed, and that the amount of £112, awarded to A. P. De Villiers, be paid into Court. And the Master to notify, by public advertisement, to the parties, claiming to be entitled to the same, to appear, within the first four days, of next term, in support of their right thereto."

In Re Insol-
vent estate
of De Villiers.
De Villiers
v.
Cauvin and
Sequestrator.

This day, Cloete for De Villiers, appeared, and claimed this sum, and quoted the 53d and 54th Articles, of the Sequestrator's Instructions.

15th Dec.,
1829.

Joubert for Cauvin, a creditor on De Villiers' estate, who had received no dividend, claimed this sum of £112, as part of De Villiers' estate, and contended, that rehabilitation, merely discharged the debtor personally, and his future acquisitions, but not any part of his estate, which had been surrendered to the Sequestrator.

The Commissioner for the Sequestrator, also appeared, and claimed a preference, to the extent of £81 11s. 2½d., as due to the cash account of the Sequestrator's office, on the following grounds. The Sequestrator had paid to Matthiessen, a creditor of De Villiers, the full amount of his debt, under security of restitution, before the scheme of distribution of De Villiers' estate, was made out. Afterwards, it turned out, that, after awarding every preference, to which he was entitled, there were not funds, to meet the full amount of his claim, and that there was a deficiency, of £81 11s. 2½d., and for this, as standing in the place of Matthiessen, the Sequestrator made his present claim. Matthiessen's claim, was preferable to Cauvin's, who was entitled, to be ranked, immediately after Matthiessen.

Menzies, J., held, that the 54th Article of the Sequestrator's Instructions, is so expressed, that, by the act of rehabilitation, not only is the person of the insolvent, discharged from his debts, but the claims of his creditors against his estate, are restricted to what has been adjudged to them, by the sentence of preference.*

12th Jan.
1830.

The administration of his estate, which by the sequestration, was taken from him, is by the rehabilitation, absolutely restored to him, under reservation only, of the validity of the

* The words of the Article are that he is "discharged from all claims of his creditors, excepting what has been adjudged, by the sentence of preference and concurrence." In the *Amsterdam Ordinance* for the Insolvent Chamber (*Nederl. Jaarb.*, 1777, vol. 1, p. 317), from which the Sequestrator's Instructions are copied, the words are, that he be "discharged from all debts, and never be liable for any debt, anterior to his insolvency,"—"and in case it shall after first certificate appear that the insolvent had secreted or withheld property, it shall be employed towards a distribution between his creditors."—ED.

In Re Insol-
vent estate
of De Villiers.
De Villiers
v.
Cauvin and
Sequestrator.

disposal and distribution, of such part of it, as has previously been made, by the Sequestrator, in the scheme of liquidation and distribution.

The act of rehabilitation, takes the estate, entirely out of the office of the Sequestrator, and therefore, if the construction of the act of rehabilitation, contended for by Cauvin, and the Sequestrator, were correct, it would follow, that the outstanding debts of the insolvent, after his rehabilitation, would be vested in nobody. If it were held, that such outstanding debts, still remained under sequestration, and vested in the sequestrator, it would follow, that sequestrations, would never be finally wound up, notwithstanding that rehabilitation had been granted, and that a new scheme must be made, as often, as any outstanding debt, shall be recovered after rehabilitation. No injury is done to creditors, by limiting their claim after rehabilitation, to what has been adjudged to them, in the scheme of preference and concurrence. No creditor need consent to rehabilitate his debtor, as long as he can point out, any part of the estate, which can be recovered, or of the recovery of which, there is a prospect, for by § 49, creditors are entitled, to have outstanding debts due to their debtor, assigned over to them.

He was of opinion, that the money impounded, should be paid, over to De Villiers.

The rest of the Court, were of a different opinion, and held, that the creditors, were entitled to the sum in question. (*Vide in re Taute*, 23d November, 1830.) All the judges concurred, that, under this view of the case, the Sequestrator was entitled in the first place, to the sum claimed by him, and Cauvin to the balance, and that no costs, should be given to any party.

Judgment accordingly.

STEDMAN v. CURLEWIS.

[15th December, 1829.]

Pleading—what evasive plea or answer bad.

Stedman
v.
Curlewis.

This action was brought, for certain penalties, for breach of agreement, as stipulated in said agreement.

The declaration sets forth, the conditions of the covenant,—alleges a breach thereof, and sets forth, as the ground of this cause of action, that the said defendant, did, on or about the 17th August, 1829, import, or cause to be imported, by the ship or vessel, called the *Thorne*, a case or package, containing wearing apparel, addressed, James Curlewis, *which said wearing apparel, was so imported by the said defendant*

either for the purpose of sale, or barter, or for, or on account of some person or persons, now or late, resident in Cape Town, and thereby, the said defendant did employ, or occupy himself otherwise, than for the benefit of the said plaintiff, and to his injury and loss.

Stedman
v.
Curlewis.

The defendant pleaded, that the plaintiff ought not to recover, the damages claimed, by reason of any of the allegations, contained in his declaration, for although true it is, and it is hereby admitted, that the said defendant did sign the agreement, &c., yet he denies, having committed any breach of the said contract, as has been untruly alleged in the plaintiff's declaration.

And the said defendant further says, that he admits, having received by the ship *Thorne*, in the month of August last, a case or package, containing some wearing apparel, addressed to him, *but he denies, having ordered the said goods, or having imported them, for the purpose of sale or barter, or for any other purpose, to benefit himself.*

To this plea and answer, the plaintiff excepted, for that the said defendant, hath not therein, either admitted or denied, the allegation in the said declaration contained, that the said wearing apparel, was so imported by the said defendant, either for the purpose of sale or barter, *or for, or on account of some person or persons, now or late resident in Cape Town, and thereby, did employ or occupy himself, otherwise, than for the benefit of the said plaintiff, and to his injury and loss.*

Defendant answered to this exception, that it ought to be dismissed, for that he did, in his plea or answer, "either admit, deny, or confess, and avoid all the material facts, alleged in the declaration, according to the rules and practice in this Court observed, and that he did moreover, generally deny, having committed any breach, of the contract declared upon."

In respect of the Rules 18 and 19, the Court, unanimously, sustained the exception, with costs, with liberty to defendant, to amend his plea.

IN RE RICHARDSON.

EXECUTORS OF WOUTERSEN q.q. WIDOW PALMER, v.
NISBET & DICKSON.

[23rd Feb., 1830.]

1. *Charter*—(1827) § 56,—*its effect.*
2. *Judgment*—*when final.*

3. "*Jus retentionis*"—of *Mortgagor*, against *Mortgagee*,—when available,—to enforce performance of reciprocal obligations;—of what force against *Pledgee* of *Mortgage Bond*.
4. *Pledge*—"Pand der minne"—by *Notarial Bond* of *Special Mortgage Bond*,—what effect,—and how affected by *anterior Agreement*, between *Mortgagee* and *Mortgagor*.
5. *Error*—in *final Sentence*,—how corrected.

In Re
Richardson.
Executors of
Woutersen
q. q. Widow
Palmer
v.
Nisbet &
Dickson.

On the 9th of August, 1822, Palmer and Richardson, entered by deed, into a partnership, to continue for five years, reckoned from 1st April, 1822, in the farm and fishery of Fishhoek Bay, which had lately been purchased by, and transferred to, Palmer.

In terms of this deed, which stated, that the price of the farm, &c. (f120,000), had been advanced by Richardson, Palmer executed a bond, specially mortgaging, the said farm and fishery, for f120,000, in favour of Richardson.

The deed also stipulated, that Palmer was to receive a salary, of Rds. 2000 per annum, for managing the concern.

On the 11th August, 1823, this partnership was dissolved, by a written agreement, which stipulated, that Palmer should retire from the concern, on the 10th September next, and give up all right and title, which he had, under the deed of partnership of 9th August, 1822, relative to the farm and fishery of Fishhoek Bay, on condition, that Richardson should grant to Palmer, three promissory notes, for Rds. 3000 each, payable respectively, on the 2d April, 1824, 2d April, 1825, and 2d April, 1826; Palmer *forthwith*, to transfer the Fishhoek Bay estate, to Richardson, who was to cancel and return to Palmer, the mortgage bond for f120,000.

Possession, but not transfer, of the farm and fishery, was given by Palmer to Richardson, and the bond for f120,000 was not cancelled.

On the 8th July, 1824, Palmer obtained a provisional sentence, condemning Richardson, 1st, to pay Palmer, under security *de restituendo*, Rds. 3000, as salary for superintending the fishery, from 1st April, 1822, to 10th September, 1823, according to the contract of 9th August, 1822. 2dly, to pay Palmer, under security *de restituendo*, Rds. 3000, on condition, of his transferring Fishhoek Bay estate, pursuant to the agreement of the 11th August, 1823.

Palmer lodged this sentence for execution, with the Sequestrator, and in respect of the first sum of Rds. 3000, on the 29th September, 1824, obtained payment thereof, without being required to give security *de restituendo*.

On the 21st September, 1824, Richardson executed a notarial bond, in favour of Nisbet & Dickson, for £1800, then

advanced to him by them, *in which he specially mortgaged to them, the beforementioned bond, for f. 120,000 over Fishhoek estate*, and caused it to be thereto annexed, by the seal of the notary. This latter bond was registered in the Debt Register.

On the 29th October, 1824, Richardson surrendered his estate as insolvent, to the Sequestrator. Thereafter, the principal case, in which Palmer had obtained provisional sentence, having been proceeded in, between Palmer as the plaintiff, and the Sequestrator, as representing Richardson and his creditors, as the defendant, on the 14th April, 1825, Palmer obtained a final sentence, by which the Sequestrator, as the defendant, was condemned, to pay to the plaintiff, against a proper act of acquittal and discharge, and against transfer of the place Fishhoek Bay,

1st. Rds. 3000, with interest from 2d April, 1824 ;

2d. Rds. 3000, with interest from 2d April, 1825 ;

3d. Rds. 3000, with interest from 2d April, 1826 ; if not paid before that day ;

4th. Rds. 3000, with interest from 1st April, 1822, to 3d September, 1823.

Against this judgment, Richardson entered an appeal, which was dismissed, as being incompetent at his instance, by reason, of his being under sequestration.

The Sequestrator, by the special direction and consent, of Richardson's creditors, refused to appeal, and the judgment became final.

The Sequestrator, in liquidating the estate of Richardson, sold Fishhoek Bay, as forming part of the assets of Richardson's estate, for £1000. But Palmer, refused to give transfer, to the purchaser, 1st, until the mortgage bond, granted by him over it, for the f120,000, should be cancelled, and 2dly, until he should be paid, out of the price, to be paid by the said purchaser, the amount due to him, in virtue of the judgment of the 14th April, 1825.

Nisbet & Dickson refused, to consent to cancel the bond, unless they were awarded, a preference over said price.

The Sequestrator, brought an action against them, to have this mortgage bond declared null and void, and cancelled, and on the 16th March, 1826, obtained a judgment, declaring the said bond to be null and void, *for as far as regards the personal bond, (or obligation, or debt) of Palmer, amounting as aforesaid to f120,000, and consequently, in so far, as regards the said debt, to be subject to be cancelled in the Public Debt Register, reserving, nevertheless, and without any prejudice, such right to the defendants, Nisbet & Dickson, as they can prove themselves to be entitled to, by virtue of that mortgage bond, on the property, thereby specially hypothecated.*

Nisbet & Dickson, acquiesced in this judgment.

In Re
Richardson.
Executors of
Woutersen
q.q. Widow
Palmer
r.
Nisbet &
Dickson.

In Re
Richardson.
Executors of
Woutersen
q.q. Widow
Palmer
v.
Nisbet &
Dickson.

On the 23d February, 1827, Palmer, by his attorney Woutersen, gave transfer of Fishhoek Bay, to the purchaser, having previously, received from the Sequestrator, out of the proceeds of the sale thereof, the amount due to him on his judgment, of the 14th April, 1825, in virtue of an order of Court to that effect, obtained by the Sequestrator, (an appeal against which, by Nisbet & Dickson, had been dismissed,) under security *de restituendo*, in case he should be found to have no preference, on the said proceeds.

The Sequestrator, having, in the distribution account of Richardson's estate, awarded to Palmer, a preference on the price of Fishhoek Bay, in respect of his judgment of 14th April, 1825, Nisbet & Dickson objected thereto, and the late Court, by their sentence, dated 31st December, 1827, rejected Palmer's claim, to this preference, and awarded it to Nisbet & Dickson.

Palmer's representatives, having applied to the present Court, to set aside this sentence, and to confirm the distribution account, as framed by the Sequestrator, this application was opposed by Nisbet & Dickson, as to the preference, and by Richardson, as to the amount of the debt, due to Palmer.

1. The Court held, in conformity with their decision, in the case of the *Sequestrator v. Vos*, 19th December, 1828, ante page 286, that under § 56 of the Charter, it was now competent for this Court, as representing the late Court of Appeals, to review, and, if necessary, alter the sentence, pronounced by the late Court of Justice, of the 31st December, 1827, although final in that Court, on any grounds, on which it might have been reviewed, or altered by the late Court of Appeals, but upon no other.

2. The Court held, that the judgment of the 14th April, 1825, having been given in an action, in which Palmer was plaintiff, and in which Richardson, before his insolvency, and after it, the Sequestrator, as representing Richardson and all his creditors, were the defendants, was *res judicata*, against both Richardson and his creditors Nisbet & Dickson, and not having been appealed from, by the latter, and Richardson's appeal against it, having been dismissed, it was not only *res judicata*, but *final* against them.

And consequently, that both the late Court, and the present, in deciding the question, as to the amount due to Palmer, and as to the respective claims of Palmer, and Nisbet & Dickson, to preference, on the price of Fishhoek Bay, were bound to regulate their decision, according to what had been decided, by the judgment of 14th April, 1825, and to give it full and fair effect, even, although the case should be held, to have been wrongly decided.

3. The Court held, that the effect of this final judgment, whereby Richardson was condemned, "to pay to Palmer

against a proper act of acquittal and discharge, and *against transfer of the place Fishhoek Bay*" was, to adjudge, that, under the circumstances, which had taken place, previously to the 14th April, 1825, the obligations, contained in the agreement of the 11th August, 1823, on Richardson, to pay the sums stipulated, and on Palmer, to transfer Fishhoek Bay, were reciprocal, and consequently, that, under that deed, Palmer had a *jus retentionis*, over Fishhoek Bay, and could not be compelled to give transfer thereof, except on payment to him, by Richardson, of the stipulated sums.

In Re
Richardson.
Executors of
Woutersen
q.q. Widow
Palmer
r.
Nisbet &
Dickson.

The Court held, that, even if the judgment, of the 14th April, 1824, were not final, yet, that, in so far as related to the matters, now under the decision of the Court, that judgment was right, and ought to be affirmed. For, although, in so far as it adjudged Richardson, after and notwithstanding the deed of 11th August, 1823, to pay Palmer Rds. 3000, as salary for any time, previous to that date, it might be deemed erroneous, on the ground, that the Rds. 9000, payment of which was stipulated in that deed, were intended, to include and cover all demands, for part or future salary, which appeared to the Court, to be a doubtful point, or, although it might be erroneous, in as far as it had the effect of finding, that Palmer was entitled to refuse transfer of Fishhoek Bay, until he was paid, not merely the Rds. 9000, stipulated in the deed, of the 11th August, 1823, but also the Rds. 3000, claimed as salary, due previously to that deed, as to which, the Court had much less doubt,—yet, this claim has been discharged, by the payment made by Richardson, on the 29th September, 1824, before his insolvency, in satisfaction of the provisional sentence, and therefore is not at all involved, or included in the question, now pending, as to Palmer's right of preference for the Rds. 9000, which the Court held, to have been rightly decided, by the judgment of the 14th April, 1824. Because, although in the deed of the 11th August, 1823, it was stipulated, that transfer of Fishhoek Bay should be given *forthwith*, and that, if it had been demanded, before the date, when the first sum of Rds. 3000, stipulated in the deed, became due, Palmer could not have refused to give it forthwith, on the ground, that he had any *jus retentionis*, until the Rds. 9000, no part of which would then have been due, should be paid him; yet this first instalment of Rds. 3000, had become due and been sued for, before transfer had been demanded, and consequently, Palmer then had a *jus retentionis*, which entitled him, to refuse to transfer Fishhoek Bay, until this sum of Rds. 3000, should be paid. Voet 19: 1, 23; 16: 2, 20, l. *unica* Cod. *etiam ob chirogr. pec. pign.** (8 27.)

* Whether the *jus retentionis*, operates against the trustee of the insolvent estate, *negot* Voet 42: 7, 7.

In Re
Richardson,
Executors of
Wentersen
q.q. Widow
Palmer
v.
Nisbet &
Dickson.

And because the sequestration, of Richardson as insolvent, had the effect, of making his obligation, to pay the two other instalments, immediately prestable. *Vide* Pothier on Contracts, pt. 2, c. 3, art. 3, § 235; Manuel, trustee, v. Norden, 3d December, 1844: Ordinance No. 6, 1843, § 29.

Consequently, when the Sequestrator called on Palmer, to transfer Fishhoek Bay, he had a *jus retentionis*, which entitled him to refuse transfer, until he was paid the whole three instalments, amounting to Rds. 9000, all of which were then instantly due to him, in virtue of the contract of 11th August, 1823, in respect of which, the transfer was claimed.

The *Court held*, that Palmer having waived his *jus retentionis*, and consented to give transfer of Fishhoek Bay, to the purchaser from the Sequestrator, solely, in consideration of payment being made to him, out of the price of the Rds. 9000, claimed by him, under security to repay the same, in the event, that he should be found, to have had no valid right of retention, giving him a preference for his debt, the proceeds of the sale of Fishhoek Bay, must, in the present question, be considered in the same situation, with reference to Palmer, as the place itself, if unsold and untransferred, would have been.

The *Court held*, that the effect of the judgment, of the 16th March, 1826, was merely, to annul the personal obligation of Palmer, in the bond granted by him to Richardson, for £120,000, and to free him, from any claim against him, personally, in respect of that bond, but that it had no effect, either to strengthen, or impair, any *jus hypothecæ* over Fishhoek Bay, or its proceeds, which Nisbet & Dickson would otherwise have had, in virtue of the special mortgage of that bond, granted to them by Richardson, in the bond of the 21st September, 1824.

The *Court held*, that, even if the bond of the 21st September, 1824, specially mortgaging to Nisbet & Dickson, the special mortgage bond, for £120,000 over Fishhoek Bay, was sufficient in law, to constitute to any extent, in favor of Nisbet & Dickson, any right of hypothec, or claim to preference over Fishhoek Bay, and consequently over its proceeds,—yet, that the right, which Nisbet & Dickson acquired by this impignoration, could not be greater, or more effectual, than that which Richardson himself, under and by virtue of that bond, for £120,000, had on the 21st September, 1824, when this impignoration was made, which was subsequent to the agreement, made between Richardson and Palmer, on the 11th August, 1823,—to the institution of Palmer's action on that deed,—and to the provisional sentence, which, on the 8th July, 1824, he had obtained against Richardson. (*Vide* Voet 20: 1, 17; and 20: 3, 1.)

Now, had Richardson, on the 21st September, 1824,

attempted to enforce payment of Palmer's bond, for f120,000, or obtain transfer of Fishhoek Bay, Palmer would have been entitled, to defend himself, by pleading the agreement of 11th August, 1823, and offering transfer of Fishhoek Bay, on receiving a cancellation of that bond, and payment or security for the Rds. 9000, stipulated in that agreement, to be paid by Richardson to him.

In Re
Richardson.
Executors of
Woutersen
q.q. Widow
Palmer
v.
Nisbet &
Dickson.

Consequently, Palmer's *jus retentionis*, until he should receive payment of the said Rds. 9000, must now operate as effectually, against Nisbet & Dickson, who can be in no better situation than Richardson, as it would have done, against Richardson himself.

4. The Court held, that the bond for f120,000, specially mortgaging Fishhoek Bay, was not impignorated effectually to Nisbet & Dickson, by their bond of 21st September, 1824, because that bond had not been executed in the form, prescribed by law, for the impignoration of bonds, specially mortgaging immoveable property. (*Vide* Groenewegen ad l. 18, *Digest*. lib. 13, tit. 7.*) And that, even if Palmer had no preference, in virtue of his *jus retentionis*, over the proceeds of Fishhoek Bay, Nisbet & Dickson would have been entitled, to no preference, on those proceeds, because a notarial bond, although duly registered, gives no preference, on the proceeds of immoveable property, over concurrent creditors. (Van Leeuwen, Cens. For., 4, 11, 16.)

5. The Court held, that although the judgment of the 14th April, 1825, was a final sentence, yet, as final sentences may be altered, in respect of errors, appearing on the face of the

* The authority of Groenewegen is confirmed by Schorer ad Grotius 2: 5, § 13, n. 17, and 2: 48, n. 31; Voet 20: 1, 9, and Van der Linden's Institutes, b. 1, c. 12, sect. 3, p. 177.

The 14th Article of the Ordinance on the 40th penny (cf. G. Pl. B. vol. 1, p. 1957, art. 11) to which Groenewegen refers, and upon which his opinion is founded, is renewed by the Placaats of April, 1671 and June, 1695. (*Vide* G. P. B. vol. 3, p. 1009, and vol. 4, p. 908.)

By these various Placaats, it was enacted:—

1. That of all mortgage bonds, *schepenkennissen*, *kustingbrieven*, or other like bonds, by which immoveable property is mortgaged, an impost, of the 40th penny in the amount, shall be paid.

2. That no *cession*, or *pledging*, of such bonds, shall be of any effect, unless made *coram judice loci*, and the same, after payment of the 40th penny, be registered.

And to prevent fraud, notaries were forbidden, by Placaat of 11th March, 1723, (*vide* G. P. B., vol. 6, p. 1032, art. 18,) to pass any deed of transfer or hypothecations, of immoveable property, or any deed, whereby such mortgage bonds, &c., were pledged or ceded, on pain of nullity. (*Vide* Lybrechts Red. Vert., vol. 1, p. 10, and vol. 2, p. 294.)

The above fiscal law, however, in respect of the 40th penny, has never been in operation in this colony (cons. case Discount Bank v. Dawes, *supra* p. 388). No 40th penny has ever been paid, or exacted, on any mortgage bonds, *schepenkennissen*, or *kustingbrieven*, although passed *coram judice*; nor on *cessions*, or *pledges* of them. With regard to the latter, it has ever been the practice in this

In Re
Richardson.
Executors of
Woutersen,
q.q. Widow
Palmer
v.
Nisbet &
Dickson.

record,* and as from the record in that case, it was evident, that the Court, or more probably their secretary, in writing out the judgment, had inadvertently, awarded to the plaintiff, interest on the Rds. 3000, mentioned in the 4th article, which had not been claimed by the plaintiff, and which could not, by any legal possibility, have been due to him, and which had not been awarded to him, in the provisional sentence, given in his favor, for that sum of Rds. 3000, that judgment must be amended, by expunging the award of that interest.

On these grounds, the Court gave judgment, sustaining the claim, made on the part of the widow Palmer, for preference on the proceeds of Fishhoek Bay, to the extent, of so much of the sums, awarded to the plaintiff, by the first four articles of the judgment of 14th April, 1825, (except the interest awarded on the 4th article,) as had not been previously paid, and that the Master do amend the scheme of distribution accordingly. Nisbet & Dickson to pay Palmer's costs.

IN RE RICHARDSON.

RICHARDSON v. NISBET & DICKSON.

[15th December, 1829.]

"In Fraudem Creditorum,"—Insolvent not entitled to challenge such transaction.

In Re
Richardson.
Richardson
v.
Nisbet &
Dickson.

In this case, Richardson, the insolvent, objected to certain claims, of Nisbet & Dickson, which had been sustained by the Sequestrator, in his scheme of distribution, but it appearing, that the only ground of the objection, was, that the transaction, out of which those claims arose, was reducible under the provisions of the Proclamation, 6th February, 1805, as being *in fraudem creditorum*; the Court held, that it was only competent, to the creditors of the insolvent, to set aside that transaction, and that the insolvent, was not entitled, to challenge the transaction, on such ground.

colony, to *cede* them, either by a cession endorsed thereon, (*ut vide* Smuts v. Stack, *supra* p. 297,) or by notarial deed of cession, in both cases with delivery,—or to *pledge* them, as a *pand ter minne*, by notarial deed, to which such bond, was annexed, under the seal of the notary. Nor have the notaries of this colony, by the instructions for notaries, of 2d April, 1793, been forbidden, to pass deeds, whereby mortgage bonds and the like are *ceded* or *pledged*, although they are forbidden, to pass deeds of transfer, or hypothecations of immoveable property. Cessions and pledges, so made by notaries as above, have invariably been adjudged by the late Court.—[Ed.]

* Ita l. 1, § 1, ff. *Quæ sent. sine appel.* (49. 8.)

IN RE RICHARDSON.

MEINERT *v.* NISBET & DICKSON.

[30th December, 1830.]

"Pignus Prætorium,"—not destroyed by Surrender of Estate, within 28 days.

Proclamation, September, 1805,—its effect.

Meinert, had obtained a sentence against Richardson, on the 2d September, 1824, for Rds. 1334, which was lodged with the Sequestrator, for execution.

On the 22d of October, 1824, Richardson gave up certain effects, to the Sequestrator, in discharge of that sentence, of which an inventory was taken, in due form.

Richardson's estate, was surrendered as insolvent, on the 29th October, 1824.

Meinert, claimed a preference, on the proceeds of those effects, by virtue of his *pignus prætorium*, which claim, was rejected by the Sequestrator.

Cloete, for Meinert, argued in support of that claim, and quoted *ll.* 1, 2, 3, *Codicis, si in causâ jud. pign. captum.* lib. 8, tit. 23; Sequestrator's Instructions, article 40.

Joubert, *contra*, maintained, that, by virtue of the Proclamation of September, 1805, the effect of the surrender of the estate was to destroy the *pignus prætorium*.*

The Court held, that the Proclamation had not that effect, and sustained the claim, for preference, with costs.†

In Re
Richardson.
Meinert
v.
Nisbet &
Dickson.

BRED A AND OTHERS *v.* MULLER AND OTHERS.

[17th December, 1829.]

Fishing in a Lake,—how far trespass, if Lake situate within the boundary of private Property.

This was an action, brought for £10 10s., as damages from the defendants, for having forcibly, entered the close, or boundaries of Zoetendal's Valley, and there fished, and caught fish, the property of the plaintiffs, and disposed of them, after

Breda and
Others
v.
Muller and
Others.

* Proclamation of 6th September, enacts, that "all hypothecations, given by the insolvent for existing debts, 28 days before surrender, or if there be no surrender, 28 days before the inventorisation of his estate, shall be null and void." Consul. Voet 42: 8, 18.—[Ed.]

† Ita Van der Linden, Jud. Praktyk, b. 2, c. 6, § 19; Voet 20: 2, 28; 20: 4, 28; et 42: 1, 37; Matthæus de Auct., 1: 19, 59, a *quibus dissentit*; Van Leeuwen, Cens. For., 4: 9, 14, and 3: 11, 7.—[Ed.]

Breda and
Others
v.
Muller and
Others.

having been warned off the ground, by the plaintiffs' overseer, who showed them a true chart of the place, and pointed out the boundaries.

The defendants denied, having knowingly or wilfully, entered any close or land, defined by visible beacons, or landmarks of the plaintiffs' property, or having knowingly and wilfully, trespassed upon any part, of the said lands, to the prejudice and injury of the plaintiffs. And the defendants, moreover, maintained, that the defendants, by catching any fish, within any part of the lake, or water, commonly called the Zoetendal's Valley, did not commit, any act, or wrong, to the injury or loss of the plaintiffs, or of any of them. Wherefore the defendants pleaded the general issue.

Replication.—The plaintiffs say, they ought not to be deprived, of their aforesaid action, by reason of any matter or thing, in the said plea contained, and therefore they pray judgment, as heretofore prayed.

Cloete, quoted Van Leeuwen's Commentaries, b. 2, c. 1, § 11, p. 104, and c. 3, § 1, p. 107; Voet 41: 1, § 4, 5; and maintained, that the fish were *feræ naturæ*, and were not the property of the plaintiffs, before they were caught, and became the property of the defendants, as soon as caught. That no action of trespass will lie, even when boundaries are visible, unless previous notice given, not to trespass. Voet 41: 1, § 4.

The Court were of *opinion*, in respect of the evidence, that the defendants, had trespassed on the plaintiffs' ground, by going, and drawing their nets on it, and that, under the circumstances of the case, the trespass must be deemed, to have been committed, after due and sufficient warning, not to do so, and after the boundaries had been pointed out, and therefore, without deciding, what would have been the law of the case, if the trespass had taken place, without warning, that the plaintiffs were entitled, to damages and costs.

Damages one shilling and costs.

The Court held, that it was unnecessary, to decide, whether the fish in this case, were *feræ naturæ*, and so not the property of the plaintiffs, because this part of the case was not pressed.

Menzies, J., had no doubt, they were *feræ naturæ*.

The plaintiffs, before bringing the action, offered to pass from it, provided, the defendants would, in the public newspaper, acknowledge, that on the occasion in question, they had trespassed.

The Court therefore held, that the plaintiffs were entitled to costs.

NISBET & DICKSON v. THWAITES.

[18th December, 1829.]

1. *Proclamation of 6th September, 1805, does not annul or destroy the Debt or Bond, but only the Securities given by Insolvent.*
2. *Surety not released, although special Mortgage given by Debtor be annulled, under Proclamation of 6th September, 1805.*

This was an action, brought by the plaintiffs, to have certain immoveable property of the defendant, mortgaged in two bonds, dated on the 22d October, 1824, declared executable.

Nisbet &
Dickson
v.
Thwaites.

The facts of the case are these:—In July and September, 1824, Nisbet & Dickson, by discounting two promissory notes for him, advanced to Richardson two sums, one of 7713 guilders, and another of 15,000 guilders. Richardson's affairs being in a very doubtful state, Nisbet & Dickson were anxious to have additional security, and on the 22d October, Richardson executed two bonds for the above two sums, respectively, both of them in precisely the same terms, viz., he acknowledged himself to be really and lawfully indebted to and on behalf of Nisbet & Dickson, in the sum of f15,000, arising from money duly lent and advanced to him, which sum he hereby promises and undertakes to pay on the 28th April, 1825, *and binding for the security thereof specially a mortgage bond for f120,000, passed by J. D. Palmer, and, moreover, binding specially all his property, both moveable and immoveable.* Appeared likewise Thomas Thwaites, who declared, for the better security of the said sum of 15,000 guilders, to bind specially as a mortgage certain three lots of ground.

On the 29th October, 1824, Richardson's estate was surrendered to the Sequestrator as Insolvent, and in consequence of the abovementioned bonds having been executed within twenty-eight days prior to the surrender of Richardson's estate, Nisbet and Dickson were ranked only as concurrent creditors, and as not entitled to any preference, in respect of these bonds, on the bond for f120,000, or on any other property of the insolvent.

Nisbet & Dickson therefore sought to have Thwaites' property declared executable for these debts.

In the pleadings, the defendant originally stated several grounds of defence against this claim, but at the trial these were all departed from, and the only defence then maintained by Cloete, for the defendant, was, that by the Proclamation, 6th December, 1805, the bonds executed by Richardson were

Nisbet &
Dickson
v.
Thwaites.

absolutely null and void, and not merely the security or mortgage thereby constituted rendered ineffectual;—that the principal obligation being in this way utterly destroyed, the obligation of Thwaites, which was only accessory to the mortgage bond of Richardson, was therefore discharged, and quoted Voet 20: 6, 1.

Joubert, for the plaintiffs, maintained that the Proclamation of 1805 does not annul the bonds, but merely declares the securities therein constituted null and ineffectual, that the principal debt still subsists, that the plaintiffs have been ranked as concurrent creditors in virtue of these very bonds, and that the obligation of Thwaites was accessory to the debt, and not to the mortgage given in security of it, and consequently continued to subsist, notwithstanding the mortgage was annulled by the act of the law.

[*Cur. Adv. Vult.*]

1. The Court held, that the defence maintained was ill-founded. The Proclamation of 6th September, 1805, enacts,—“That henceforth all transfers, cessions, and pledges (*verpandingen*, rights of preference over property in security of debts), for securing debts already existing, made by an insolvent debtor within twenty-eight days before the day of surrender has taken place, or before the day on which his estate inventoried, shall be null and of no effect.

“Likewise, that for new debts contracted within the said period of twenty-eight days, no property shall be allowed to be pledged (bound, *verbonden*) which the debtor before that time has possessed, on pain also of nullity of the pledge (*verbond*) unless it shall clearly appear that the money borrowed by him had been used in payment of previous debts, for which the property pledged had already been pledged. In all other cases, no debts howsoever contracted within twenty-eight days before the surrender or inventory shall have any preference, either personal or real, except only when and so far as the property or money thereby acquired, may still be found in the estate at the time of making the inventory.”

In no part of this Proclamation, is it enacted, that the old debt, for which preferent security is given within the twenty-eight days, or the new debt contracted within the twenty-eight days, shall itself be held null and void, or that no effect in law shall be given to any part of the instrument by which the preferent security is constituted. All that is enacted is, that all transfers, cessions, and pledges so given for a former debt, and all pledges so given for a new debt, shall be null and of no effect. In the present case, the bonds granted by Richardson, were granted in security of a previously existing debt, which still subsists against him, in favour of the plaintiffs,

and for it they might sue him on these very bonds. It is impossible therefore to say that, in consequence of the Proclamation, there no longer subsists any principal debt, to which the defendant's cautionary obligation can be accessory.

Nisbet &
Dickson
v.
Thwaites.

2. And on looking at the terms of the bond, it is equally impossible to maintain, that the defendant's cautionary obligation is only accessory to the obligation hypothecating the bond for £120,000, and not to the original debt itself. The defendant's allegation, that it was only on the faith that the security over the bonds for £120,000 would be valid and effectual that he agreed to bind his property, cannot benefit him. The reason why the creditors insisted for the defendant's accessory obligation was probably to provide for their security, in the event of the security over the bond for £120,000 being rendered ineffectual by the operation of the Proclamation, in consequence of the debtor's sequestration within twenty-eight days.

Judgment for the plaintiffs, with costs.

VAN DEN BERG v. MALHERBE.

[22d December, 1829.]

Surety—who has bound himself only for a certain time, when not liable after the expiration of that term, even though he has bound himself as Joint Principal Debtor.

Toerien was indebted to Van den Berg in Rds. 1043. For a part of this debt Malherbe became surety by the following obligation:—

Van den Berg
v.
Malherbe.

"I, the undersigned, bind myself *as surety* and joint principal debtor for C. M. Toerien, for the sum of Rds. 100, for a term of one year.

(Signed)

"J. MALHERBE.

"French Hoek, 15th May, 1825."

No demand was made by the creditor on the debtor, or on the surety, during the year, from 15th May, 1825, till 15th May, 1826. On the 19th May, 1826, the creditor insinuated the principal debtor to pay, and on his refusal brought an action against him, and recovered sentence, which he lodged with the Sequestrator for execution.

On the 22d September, 1826, the debtor appeared before the Sequestrator, and declared on oath that he possessed no property whatever. The creditor then sued the surety before the Landdrost of Stellenbosch, who gave judgment for the

Van den Berg
v.
Malherbe.

defendant, who proved, that so late as the 9th May, 1826, the principal debtor possessed property to the amount of at least Rds. 900.

The *Court* were of opinion, that, by the words of the above obligation, the obligation of the surety was limited to the term of one year,* and, therefore, as no demand was made on him, nor the principal debtor proved to have become insolvent within the year, the *Court* affirmed the sentence appealed against, with costs.†

KORSTEN v. CUYLER.

[24th Dec., 1829.]

1. *Sequestrator's Instructions*, Art. 87. *Duty of Landdrost to execute Sentences in the Country Districts.*
2. *Landdrost acting as Sequestrator, personally liable for Damage occasioned by his negligence, or by that of his Sub-Agent.*
3. *Evidence*,—*Declaration on oath before a Notary, by a person on deathbed, not admissible.*

Korsten
v.
Cuyler.

The declaration set forth that the defendant was the responsible agent of the Sequestrator, in the district of Uitenhage. That a sentence, obtained by the plaintiff, against Van Buuren, for £1715, was, in the manner then lawful and customary in this colony, lodged with the Sequestrator for execution. That the Sequestrator, on the 18th April, 1823, forwarded said sentence to the defendant in the usual manner, as his agent for Uitenhage, for execution against the property of Van Buuren, according to law. That the defendant did not comply with his duty and instructions as agent to the Sequestrator, but utterly neglected and omitted to do so, and acted contrary thereto, and thereby caused the just claims of the plaintiff to remain unpaid and unsecured, and a total loss thereof, at a final distribution of Van Buuren's estate, the same having been subsequently surrendered and administered as insolvent; by means of which neglect of duty the plaintiff has been damaged to the amount of £1715.

The defendant pleaded the following exception:—That this action has been improperly instituted against him, because admitting that, as Landdrost of Uitenhage, he was instructed

* Cons. Van der Linden, Gewysd. cas. 24; Schorer ad Grotium Inl. 3: 43, 8.

† The nature of the debt of Toerien to Van den Berg, does not appear in the case, nor whether that debt could be recovered within the year; otherwise, query, reasonable time to recover from debtor. Cons. Carpzovius Defin. Fora., para. 2, constit. 19, defin. 6 et 7; Voet 46: 1, 36.—[Ed.]

to lend his aid towards the administration of the Sequestrator's department, previous to 1823, he then obtained his discharge from those duties, and upon his recommendation A. Hiddle was appointed as the express agent of the Sequestrator, by notice in the *Gazette*, dated 17th April, 1823, subject only to the responsibility of the defendant. That, admitting that the defendant may be responsible for the acts of Hiddle, as agent, yet as the sentence in favour of the plaintiff was forwarded to the Sequestrator, on the 18th April, 1823, it was consequently committed to the charge and agency of Hiddle, and the defendant is totally unable to defend this action on its merits, the same laying against the Sequestrator and his said agent, Hiddle; or either of them. Wherefore the defendant pleads the exception of non-qualification, and prays that the action may be dismissed.

Korsten
v.
Cuyler.

In support of this exception,

Cloete maintained, that, before Hiddle's appointment, this action must have been brought, in the first instance, against the Sequestrator, and not against the defendant, because, by the civil law, the *actio mandati* cannot be brought against the *delegate* of the original *mandatary* in the first instance, that the *mandatary* himself must be first sued, or at least made a co-defendant in the action against the delegate, and quoted Voet 17: 1, 5 and 8; and because the Sequestrator must be considered as the *mandatary* of the plaintiff, and the defendant merely as the delegate of the Sequestrator, in the execution of sentences, seeing that the 87th article of the Sequestrator's Instructions, which is the only law by which the Landdrosts were directed or required to interfere in the execution of sentences, does not expressly entrust the execution of sentences to the Landdrost as an independent officer, but merely directed him to assist the Sequestrator when required by him; and he was thus rendered merely the subordinate agent or delegate of the Sequestrator. (*Vide* also § 89 of Instructions to Landdrost.)

2dly. He maintained that, by virtue of Hiddle's appointment, and of the bond by which two persons became bound as sureties for Rds. 10,000 *on behalf of Government*, or to the defendant, acting as Sequestrator of Uitenhage for Hiddle, "who has agreed to take upon himself the duties of the Sequestrator's department in Uitenhage," the defendant was discharged from all further responsibility, and that Hiddle became the only person responsible, at least in the first instance, for what he did as agent for the Sequestrator.

Joubert argued *contra*, and produced two letters, the one from the Secretary to Government to the defendant, dated 12th March, 1823, and the other from the defendant to the Sequestrator, dated 16th June, 1823.

Korsten
v.
Cuyler.

1. The *Court held*, that the 87th article of the Sequestrator's instructions (*vide* the original, in Dutch) made it the imperative duty of the Sequestrator, whenever a sentence was to be executed in any of the country districts, at a distance from Cape Town, to give over the sentence to the Landdrost of that district for execution, and made it the peculiar and proper duty of the Landdrost thereafter to put the sentence into execution, in the manner prescribed by the Sequestrator's Instructions;

2. And consequently, made the Landdrost personally liable for any damage caused by his negligence or misconduct. That Hiddle was only appointed a sub-agent to the defendant, to assist him, and that by this appointment the defendant was not in any way discharged or released from the responsibility which, in his character of Landdrost, attached to him for what was or was not done in the execution of sentences transmitted to him by the Sequestrator.

And on these grounds dismissed the exception, with costs, and ordered the defendant to plead to the action on the merits.

The defendant put in his plea, and after hearing the evidence adduced on both sides, the Court gave judgment for the plaintiff, for Rds. 2471, with costs.

23d Dec. 1830.

3. In the course of the trial of the above case, the Attorney-General, for the plaintiff, proposed to call a notary, to prove a declaration, made on death-bed by a person, who would have been called as a witness if alive, which declaration he proposed to put in evidence, and quoted Philips on Evidence, vol. 1, c. 7, sect. 7, p. 235 and 236 (7th edit.), and the cases therein cited, particularly Wright, on the demise of Clymer, v. Littler.

The *Court held*, that this declaration was not admissible in evidence, and that there was no analogy whatever between the cases cited and the present.

THWAITES v. HEATH.

[3d June, 1830.]

Pleading,—Notice to produce.—Insertion of the Copy of any Document in the Schedule of Documents equivalent to Notice to produce the Original.

Thwaites
v.
Heath.

In this case, the *Court decided* that when a party has inserted in the schedule of documents, of which he is to avail himself at the trial, a copy of any document, this shall be held as notice to that party to produce the original, if it be in his possession.

NISBET & DICKSON *v.* RICHARDSON'S ESTATE.

[3d June, 1830.]

Appeal.—How value of subject-matter in dispute computed under Section 51 of Charter 1 (§ 50 of Charter 2).

Judgment was given in this case, refusing Nisbet & Dickson liberty to appeal against the judgments given against them in favour of any of the other creditors, on the ground that the subject-matter in dispute, in any of the questions, with any of the other creditors, was not of the value of £1000; and as the questions with the different creditors were all quite distinct from each other, that the circumstance of those separate and distinct questions having all occurred in the liquidation of Richardson's insolvent estate, did not entitle Nisbet & Dickson to accumulate those distinct cases, in order, in this way, to make the subject-matter in dispute of the value of £1000.*

Nisbet &
Dickson
v.
Richardson's
Estate.

IN RE WAHL.

MEYER *v.* DENEYS AND OTHERS.

[17th June, 1830.]

Registration.—What will not bar objection of nullity, in respect of want of due Registration of Mortgage Bond, in the Colonial Debt Register.

The facts of this case were, that Wahl, on the 18th January, 1819, granted a bond to Kotze for Rds. 4000, in security of which he mortgaged certain slaves, and G. H. Meyer and F. van Reenen bound themselves as sureties and co-principal debtors.

In Re Wahl.
Meyer
v.
Deneys and
Others.

The mortgage of the slaves was duly registered in the slave register, on the 25th January, 1819, but it was not registered in the colonial debt register until 2nd June, 1827.

On the 10th February, 1819, (the bond was dated 10th January, but it was evident, from the tenor of the bond, and it was admitted, that its true date was 10th February, and that 10th January had been inserted by mistake,) Wahl granted a bond in favour of Tromp, for 8000 guilders, in security of which, Deneys and Herman bound themselves as sureties and joint principal debtors; and for the due performance, as

* Cons. Voet 49: 7, 5.

In Re Wahl.
Meyer
v.
Deneys and
Others.

surety, of what has been aforewritten, the first appearer declared specially to mortgage his slaves, named Cupido, Syres, November, and Rosa, which slaves, the appearer, by bond dated the 18th day of January last, executed before me, the notary, did already mortgage to and on behalf of Mr. Johannes Jacobus Kotze; *and in which second mortgage they, the sureties, declared to be satisfied.*

This bond was registered, both in the slave register and in the colonial debt register, on the 22nd February, 1819.

Wahl became insolvent, and his estate was placed under sequestration. The Commissioner, in his scheme of liquidation, preferred the bond in favour of Tromp, on the proceeds of the slaves mortgaged.

Cloete, on the part of Meyer, the surety of Kotze, had obtained a rule, on the sureties in Tromp's bond, to show cause why the scheme of the Commissioner should not be amended; and in support of this rule, this day argued, that Meyer was entitled to claim a preference for Kotze's bond, on the said proceeds, over Tromp's bond, in respect of the clause in Tromp's bond, quoted above, which, he maintained, barred the sureties in Tromp's bond from stating the objection of want of due registration, which it would otherwise have been competent for them to state to Kotze's bond, as this clause was equivalent to an obligation, on their part, not to challenge Kotze's bond.

The Court were of a contrary opinion, and discharged the rule, and confirmed the scheme of the Commissioner, with costs. (*Vide Kotze v. Meyer*, 7th September, 1830, *post.*)

✓ LOLLY v. GILBERT.

[17th June, 1830.]

Partnership.—*It is not necessary to bring an Action in the name of a sleeping Partner.*

Lolly
v.
Gilbert.

In this case, the *Court held*, that it is not necessary, in an action for a debt due to a company, brought by the company, to insert the name of a sleeping partner, as one of the plaintiffs, but that it is sufficient to bring the action in the name of the partner or partners who hold themselves out as such to, and are dealt with as such by, the public, and with whom, as such, the debt was contracted by the defendant.

PRINCE, q.q. DIELEMAN, v. BERRANGE, ALIAS ANDERSON.

[24th June and 1st September, 1830.]

1. *Children.—Education.—Obligation of surviving Parent, under clause of Mutual Will, giving Usufruct of Children's portion, to defray their Education, for the interest of their portion.*
2. *"Kinderbewys."—Relief from effects of error in calculating "Kinderbewys."*
3. *"Negotiorum gestor"—for Minor, when not entitled to Costs.*
4. *Guardian,—whether they can expend, on Education of Ward, more than the annual Interest of Minors, without authority from the Court.*
5. *Guardians, entering into litigation concerning the Property of Minors, without the authority of the Court, personally liable for Costs.*
6. *Effect of judicial admission in error.*

The deceased, Dieleman, and his wife, the defendant, now married to Anderson, executed a mutual will, which contained the usual clause giving the usufruct of the children's portion, (which in this case was the deceased's half share of the joint estate,) to the survivor, until their majority, in order the better to enable the survivor to educate them. Previously to her second marriage, the defendant executed a *kinderbewys* in favour of her two sons, the plaintiffs, for one-half of the joint estate, amounting, according to the valuation in the inventory, to Rds. 41,649.

Prince,
q.q. Dieleman,
v.
Berrange,
alias
Anderson.

In this action, which was brought by the plaintiff, as the attorney of the two sons of Mrs. Anderson, to recover the amount due to them by their mother, as their paternal inheritance constituted by a *kinderbewys*, the defendant claimed a deduction of Rds. 33,230, admitted to have been disbursed by her, for the education of her two sons in England, and supported by proper vouchers.

1. The *Court held*, that even, although the sums expended on the education of the two sons beyond the amount of the annual interest of their property, had been expended necessarily, and for suitable purposes, yet, by the law of Holland, as well as by the express condition of the mutual will of the defendant and her first husband, she was bound to educate her two sons in a *suitable manner*, for the usufruct of the interest of their portions, how trifling soever it might have been, and if, in giving them an education which she considered suitable, she exceeded the amount of the interest, she could

1st Sept. 1830.

Prince,
 J. J. Dieleman,
 r.
 Berrange,
 alias
 Anderson.

not claim the balance from her sons. Voet 25: 3, 16; Van Leeuwen's Roman Dutch Law, 1: 13, 9, p. 65, (Eng. ed.); Van der Linden's Instit., b. 1, c. 5, § 4, p. 104; Van der Keessel, Thes. 152; Grotius' Introd. 1, 9, §§ 6-11.

2. The Court also held, that the defendant was entitled to a deduction from the amount of the *kinderbewys*, of the sum of Rds. 3000, being one-half of the sum at which, at the time of making the *kinderbewys*, the slave Steyntje and her children, who were evicted from the estate subsequently to the execution of the *kinderbewys* by a decision of the Privy Council, had been valued; because in estimating the value of the joint estate of the deceased Dieleman and his widow, the defendant, Steyntje, had been supposed and taken to be a part of that estate, and Rds. 6000 had been added to the estimated value of the estate expressly on this account.

The judgment of the Privy Council decided that Steyntje was free and not a slave, and consequently did not form part of the joint estate at the time the valuation was made, and, therefore, that an error had been committed in the valuation of that estate, which had occasioned an error in the amount of *kinderbewys* to the extent of Rds. 3000.

The intention of the defendant, in executing the *kinderbewys*, having been only to bind herself to pay to her sons one-half of the joint estate, and no more, and the true amount of the half of the estate having been Rds. 38,649 instead of Rds. 41,649, the sum actually inserted in the *kinderbewys*, in consequence of the above-mentioned error, the defendant is entitled now to be relieved from the consequences of this error.*

3. The defendant also claimed to be allowed to deduct one-half of the expenses which, after the execution of the *kinderbewys*, had been incurred by her in the colonial Courts and before the Privy Council, in trying the question as to the freedom of Steyntje and her children, who had been claimed as slaves, belonging to the joint estate, and as such valued in the inventory at Rds. 6000, and the value taken in account on settling the amount of the *kinderbewys*; but who, by the judgment of the Privy Council, had been declared free, and evicted from the estate.

The plaintiff had, with the concurrence of the Court, allowed the defendant a deduction of Rds. 3000 from the amount of the *kinderbewys*, as being one-half of the value of the said Steyntje and her children.

It was admitted, that when the action respecting Steyntje had been commenced and carried on, the defendant was not the guardian of the plaintiffs, who had other guardians, that

* Ita Voet 5: 2, 54-56.

the plaintiffs had not, by themselves or their guardians, been in any way parties to that action, nor had given the defendant any guarantee for the costs.

The *Court* held, that, as the defendant had instituted that action *causa sui proprii commodi*, and, as owing to its unsuccessful termination, the minors, the plaintiffs, have derived no benefit whatever from it, those costs have not been *in rem versum* of the plaintiffs, nor have they been *locupletiores facti* thereby, the defendant cannot, as a *negotiorum gestor*, claim any part of those expenses, *actione contraria negotiorum gestorum* (*vide* Voet 3: 5, 8 and 9), and the plaintiffs are under no equitable obligation, to repay any part of those costs. The Court therefore rejected the defendant's claim.

4. The *Court* expressed very grave doubts whether a guardian, who had under any circumstances expended on the education of his minor ward more than the annual income, derived from the minor's property, without first having obtained the authority of the Supreme Court, or of the Orphan Chamber, while it subsisted, (*vide* Orphan Chamber Instructions, § 47,) could claim repayment of the excess from the minor after majority.*

No decision was however given on this point, as the case was decided on other grounds.

5. The Court expressed an opinion, that if guardians enter into litigation concerning the property of minors, without having first obtained the authority of the Court, they are themselves personally liable for the costs, and cannot recover them from the minors if the litigation shall be unsuccessful.†

6. The defendant, in her plea, also alleged that the sums paid by her to the plaintiffs after their majority, on account of their inheritance, amounted to between Rds. 5 and 6000.

In their replication, the plaintiffs had offered to allow, on this account, a sum of Rds. 1350, which they admitted had been received.

The Court referred the vouchers produced by both parties to the Master, to examine the account between them, and to report; and gave judgment for the plaintiffs for the amount claimed by them, under deduction of such sums as, by the report of the Master, shall appear to have been paid to them by the defendant since their majority.

Postea.—The Master reported, that the sums received by 31st Dec. 1830. the plaintiffs from the defendant, since their majority, amounted to Rds. 833, and no more. Cloete, for the defendant, objected to the confirmation of the Master's report, and maintained,

Prince,
q.q. Dieleman,
v.
Berrange,
alias
Anderson.

* Ita Voet 27: 2, 2.

† Ita Voet 26: 7, 12.

Prince, that as the plaintiffs had once judicially admitted to have received Rds. 1350 on this account, the defendant was entitled to the reduction claimed by her to this amount.

q.q. Diekmann,
v.
Berrange,
alias
Anderson.

But after hearing the Attorney-General for the plaintiff the Court, being of opinion that the judicial admission was error,* confirmed the Master's report with costs.

BILLINGSLEY, q.q. HAWKINS, v. COLONIAL GOVERNMENT

[29th June and 11th October, 1830.]

Vendue—Public—Liability of Government.

Billingsley,
q.q. Hawkins,
v.
Colonial
Government.

This action was brought by Billingsley, as the attorney for Hawkins, against the Colonial Secretary, as representing the Colonial Government to recover £1038 3s. 11½d. with interest thereon from 26th September, 1825, being the proceeds of a quantity of beads, the property of Hawkins sold by public auction at Graham's Town on the 25th April 1825, by Willis, then vendue-master of Albany.

In consequence of the insolvency of the Vendue-master Hawkins had not received the proceeds of the beads from him, and brought this action against the Government, on ground that, by the law of the colony as it existed in the year 1825, Government was responsible to the seller of goods sold at public auction for the price for which the goods were sold, under deduction of certain charges and of 5 per cent. on the price levied on the part of Government, and that the plaintiff has done everything which he was by law required to do in order to entitle him to claim from the Colonial Government the price of his goods, which the Vendue-master had failed to pay to him.

The defendant, representing the Colonial Government, in his plea, first denied the facts alleged in the declaration, and secondly, maintained, that those facts, even if proved, are not relevant to sustain the conclusions of the plaintiff's act against Government.

The result of the evidence, and other proceedings in the case, was that the following facts were all admitted by the defendant, or clearly proved by the plaintiff:

That the members of the Commercial Exchange presented to the Governor of the Colony, on the 13th December, 1830, the following memorial:—

* Revocatur confessio ob errorem. Leyser ad Pand. vol. 7, spec. 473, n. 9.

"The memorial of the Committee of the Commercial Exchange,

Billingsley,
q.q. Hawkins,
v.
Colonial
Government.

"RESPECTFULLY SHEWETH—

"That it has been *hitherto* understood by the merchants of this colony, that they *had the security of Government* for the payment of all monies due upon the sales of goods *effected by the Commissaries of Vendue*, and the different Vendue-masters, but considerable apprehension has been excited by the terms of an answer, from the Secretary to Government, to a memorial presented on behalf of Messrs. Heugh & Co., and as it is a matter of the highest importance to the trade of the Colony that the question should be set at rest;

"Memorialists respectfully pray that your Excellency will be pleased to inform them, for the guidance of the merchants in general, whether Government is or is not responsible for the amount of all sales by public vendue;

"And memorialists, as in duty bound, will ever pray.

"STEPHEN TWYXCROSS.

"W. HAWKINS.

"J. P. SIMPSON.

"Commercial Exchange, 13th Dec., 1824."

And that the following answer thereto was transmitted by the Colonial Secretary to the members of the Commercial Exchange, on the 28th January, 1825 :—

"Colonial Office, 28th January, 1825.

"GENTLEMEN,—In reply to your memorial addressed to His Excellency the Governor, under date the 13th ultimo, I am directed to acquaint you, that His Excellency has *no hesitation whatever in declaring that the Government of this colony is responsible for the payment of all monies due upon the sales of goods effected (under the laws and regulations on this head) by the Commissaries of Vendues, and the different Vendue-masters appointed by Government;* but as a doubt appears to exist upon the subject, it is His Excellency's intention to issue a Proclamation relative thereto.

"I have the honour to be,

"Gentlemen,

"Your obedient servant,

"P. G. BRINK.

"The Committee of the
Commercial Exchange."

That the beads in question were shipped in Table Bay, on the 14th of April, 1825, and that they were sold in Graham's Town by auction by the Vendue-master, on the 25th April, 1825, under these conditions of sale, namely, that the purchaser should have three months' credit, and that

Billingsley, the seller should receive the price from the Vendue-master
 q.q. Hawkins, at five months from the day of sale ; consequently, the price
 v. became payable, by the purchasers to the Vendue-master, on
 Colonial the 25th July, and by the Vendue-master to Hawkins on the
 Government. 25th September, 1825.

That these conditions had been fixed with the consent and approbation of the Vendue-master and,—seeing that the credit given to purchasers in the great majority of sales by vendue in Albany prior to the 25th April, 1822, was for more than two months, and that the invariable practice throughout the whole colony was that, whatever might be the credit given to the purchasers, the proceeds were not payable to the seller by the Vendue-master until *two months* after the price had become due by the purchasers,—that the sale of the plaintiff's goods was at the ordinary credit allowed in such cases in Albany.

That the Proclamation of the 22d April, 1825, was not published and affixed in the usual manner at Graham's Town until after the 25th April, and that it was inserted in the *Government Gazette* only on the 23d of the same month, and, consequently, that it was impossible for the *Gazette* which contained the Proclamation to have reached Graham's Town until after the 25th of April.

That the conditions of sale must therefore have been arranged, and the sale itself effected, at a time when it was utterly impossible for any of the parties concerned to have known of, or to have it in their power, to act in obedience to the provisions of that Proclamation.

That Willis as Vendue-master, duly received the price of the beads, when it became due by the purchasers, and that Government received the percentage on the price to which it was by law entitled.

That on the 26th of September, 1825, being the day after the price of the beads, according to the conditions of sale, became payable by the Vendue-master to Hawkins, a notarial demand for payment was made, and a protest for non-payment taken, at the instance of Hawkins, by the Secretary of the district of Albany, and as such acting as a notary public.

That no notice of the default of the Vendue-master to pay was given by the plaintiff to the Landdrost of Albany within five days after payment had been demanded. But that on the 4th October, on which day the post from Graham's Town arrived in Cape Town, Mr. Hawkins, by letter, addressed to the Colonial Secretary, reported to Government the fact that payment of the price of the beads had been duly but ineffectually demanded from the Vendue-master.

That on the 6th of October, the Colonial Secretary officially answered Mr. Hawkins' letter of the 4th October.

That the Government had on the 29th September, issued instructions to the Landdrost of Albany, to suspend the Vendue-master from his office, and that he was accordingly suspended on the 13th of October.

Billingsley,
q.q. Hawkins,
v.
Colonial
Government.

That, in consequence of the course of post between Graham's Town and Cape Town, if Hawkins had caused the default of the Vendue-master to be reported to the Landdrost on the 5th, 4th, or even 3d day after the demand for payment had been made, and if the Landdrost had transmitted the report to Government by the first post thereafter, Government would not have received the report until the 11th or 12th October, being a week later than the date on which the default of the Vendue-master was actually reported to Government by Hawkins.

That the defendant has not alleged, much less proved, although warned by the Court to do so, that any loss or injury has been occasioned to Government by reason of the notice of the default of the Vendue-master having been reported directly to Government, instead of to the Landdrost of Albany in the first instance, or of the time at which such report was actually made to Government in Cape Town; and, consequently, the Court must now assume that no loss or injury has been occasioned to Government by either of those circumstances.

That Willis was indebted to Government, for percentages, in April, 1825, and prior to the publication of the Proclamation of the 22d April, and to the sale of the beads;—that on the 25th July, when the price of the beads became due by the purchasers, he was indebted to Government, for percentages and the proceeds of sales of Government property, to the amount of about Rds. 4000.

That at the monthly meetings of the Board of Landdrost and Heemraden, held during the period from April until his suspension, on 13th October, (generally once a month,) when he was bound by his instructions to pay over the percentages, which had become due to Government, prior to such meeting, he invariably failed to do so, and was constantly in arrear;—and that, when suspended, he was indebted to Government for percentages, and for the proceeds of sales of Government property, to the amount of between 10,000 and 11,000 Rds.

That between April and October, 1825, Willis was in very embarrassed circumstances, and that, although he did not actually stop payment, his want of punctuality was very great, and had become so notorious, that it must have been known to the Landdrost, independently of the fact, of his failure, to make his monthly payments of the percentages due to Government.

Billingsley, That the amount of the assets of Willis' estate, recovered
 q.q. Hawkins, by the Sequestrator, was about Rds. 25,000; of this sum
 v. Government has, in virtue of its predominant right of pre-
 Colonial ference, received Rds. 11,000, in discharge of the debt due to
 Government. Government by Willis, for percentages and proceeds of sales
 of Government property, leaving a balance in the hands of the
 Sequestrator of Rds. 14,000.

That the sum of Rds. 10,000 has been recovered from
 Willis' sureties, and placed in the Bank at the disposal of
 Government.

That the Sequestrator has, in obedience to instructions
 contained in a letter addressed to him by the Colonial Secre-
 tary, dated 8th December, 1828, paid out of the balances of
 moneys in the Bank belonging to the Sequestrator's depart-
 ment, a sum of Rds. 42,800, to the holder of certain vendue-
 rolls, of goods sold by Willis, as Vendue-master. The effect
 of which proceeding has been to distribute the whole available
 assets of Willis' estate, together with the amount received
 from his sureties, among other creditors of Willis,—to exclude
 the plaintiff, from receiving any part of the sum due to
 him out of the proceeds of Willis' estate,—and to leave the
 Government indebted to the Sequestrator's department, in
 the sum of Rds. 18,000, which must be made good by Govern-
 ment to that department, from which it appears that Govern-
 ment, in consequence of its acknowledged liability for some
 part of the claims on the Vendue department of Albany, has
 already paid Rds. 18,000.

Joubert, for the plaintiff, maintained, 1st, that the Vendue-
 master was the institor of Government, and consequently, in
 the absence of express colonial laws regulating the office,
 Government was liable to all the obligations of a prepositor,
 and quoted Voet 14: 3, 1, 3, 4.

2dly. He maintained, that the Government had expressly
 recognised this obligation by their letter of the 28th January,
 1825, addressed to the Committee of the Commercial
 Exchange; that Hawkins had made this shipment of goods,
 and ordered their sale by vendue, subsequent to the date of
 this official letter, and that the goods were sold on the 25th
 April, whereas the Proclamation of the 22d April did not
 appear in the *Gazette* till the 23d April, and, consequently, could
 not have reached Graham's Town, until after the sale had been
 completed, and, therefore, could not affect a sale made prior
 to its being known in Graham's Town. He further main-
 tained that the circular letter of the 24th December, 1825,
 contained an additional acknowledgment of their liability. He
 maintained, that the notice given by Hawkins to the Colonial
 Government, on the 4th October, 1825, was equivalent, if
 not better, than the notice required to be given by the 2d



paragraph of the Proclamation, especially as the protest for non-payment by the Vendue-master was made by the District Secretary. He maintained that, notwithstanding, the Proclamation, the sale at three and five months' credit, was not illegal, having been made before the Proclamation was known. (*Vide* the 1st paragraph of the Proclamation.)

Billingsley,
q-q. Hawkins,
v.
Colonial
Government.

3dly. That, even if the Vendue-master acted illegally in stipulating a longer time of payment for himself, the Government, as his prepositor, must be liable for his acts, especially as they had taken security from him, for Rds. 10,000, recovered the same from the securities, and held a general lien over all the Vendue-master's estate, of which they have availed themselves.

The Attorney-General contended, 1st, that this case must be decided by the rules laid down by the Proclamation of the 22d April, 1825, and according to the provisions thereof; that the Government having taken upon itself a liability, was entitled to prescribe the conditions on which it was to be liable, and that if those conditions have not been strictly complied with, the liability ceases.

2dly. That although it might perhaps be contended that what was done before the publication of the Proclamation at Graham's Town could not in equity be affected by the provisions of the Proclamation, still that no such equitable objection could be stated to the operation, in this case, of the 2d clause of the Proclamation, and that the conditions of that clause were violated in two particulars, firstly, in so far as regards the demand for payment on the Vendue-master, because the protest for non-payment having been made on the 26th September, no notice of this was given to Government, in any way, until the 4th October, more than five days after the demand, and so, beyond the period prescribed in the 2d paragraph of that clause.

And secondly, because no notice of the non-payment had been given to the Landdrost, as required by the 3d paragraph of that clause, for which the notice given to Government on the 4th October could not be deemed to be equivalent, no equivalent being admissible.

3dly. He further maintained that, if the Government were not liable, as he now endeavoured to show, under the Proclamation, it was not liable under any previously existing law; and denied that the Government and the Vendue-master were, in so far as the public were concerned, in the situation of prepositor and institor; and maintained that the Government, in relation to the public, in performing its duties, was to be considered as institor, and the public as prepositor.

4thly. He further contended that no such liability of

Billingsley, Government could be inferred from any thing in the instructions of Commissary-General De Mist, and read articles (8) 14, 198, 206 (207, 208, 209).
17. Hawkins,
Colonial
Government.

5thly. That the circular of the 24th December, 1818, although not published, became law, in consequence of being adopted in practice, and by its provisions the Government was not liable under the circumstances of the present case.

6thly. That before the circular of 1818, and the Proclamation of 1825, Government was not, by law, responsible to sellers by vendue, for any deficiency of the Vendue-master, beyond the sum of Rds. 10,000, for which, by the 14th article of the instructions to the country districts, the Vendue-master was obliged to find security to the Government.

7thly. That the circular of 1818, did not increase or in any way alter the responsibility of Government.

8thly. That by the preamble of the said Proclamation, it is clear that Government then, for the first time, intended to become responsible beyond the Rds. 10,000, and must therefore be entitled to prescribe the conditions of their responsibility.

9thly. That by the preamble, the responsibility is confined to sales made under the existing rules and regulations.

10thly. That the effect of the penultimate clause of the Proclamation was, to declare what was to be the explanation henceforward to be given to the rules and regulations, and that whether this explanation was the true and proper explanation or not, it must, after the date of the Proclamation, be taken and given effect to by the Court as the true explanation and meaning of those rules and regulations.

11thly. That this imperative explanation was given in the heads of regulations, &c., annexed to the Proclamation, which were in future to be given effect to literally, and without any reference to the rules and regulations of which they were the heads.

12thly. That the effect of the fourth head was a legal prohibition on sellers to postpone the term at which payment was to be made to them, by the Vendue-master, beyond four months from the day of sale, and, consequently, that any sale in which the said term of payment was postponed beyond four months from the day of sale was made contrary to the existing rules and regulations, and, on this ground, that the sale in question did not fall within the class, for the proceeds of which Government agreed to become responsible.

13thly. That it had been proved that two months was the time usually allowed for collecting the proceeds, previously to the vendue-rolls becoming due in Albany.

14thly. That the meaning of the 3d clause of the Proclamation was, to prevent sellers from granting to purchasers

a longer period of credit than two months, under the penalty that, otherwise, all responsibility shall rest with the seller; and, consequently, that this sale having been made at three months' credit, the Government were freed from all responsibility.

Joubert, for the plaintiff, maintained the contrary.

Billingsley,
q.q. Hawkins,
v.
Colonial
Government.

[*Cur. Adv. Vult.*]

Postea.—The Court, by a majority, Chief Justice and Burton, J., (Menziez, J., dissenting, and Kekewich, J., absent on circuit,) gave judgment for the defendant, with costs.

11th October,
1830.

The ground on which the judgment of the majority of the Court proceeded was, that the plaintiff had failed to give notice in terms of, and as required by, the 2d clause of the Proclamation,—that the enactment of this clause was imperative, and therefore that the Government was, by reason of this default, relieved from its responsibility, whatever that might otherwise have been. Wherefore they gave no decision on any of the other points in the case.

The grounds on which Menziez, J., was of opinion that judgment should be given for the plaintiff were

That the defendants have not even alleged that Willis' insolvency was occasioned by his having fraudently embezzled the vendue moneys, or that the proceeds of the plaintiff's property was in any way applied to his private use;—that it was proved that his insolvency had been caused, either by his imprudence in selecting the purchasers, to whom he sold on credit, or from his not rigorously enforcing payment from them when the prices became due;—that during the last six months Willis held office, the affairs of the department were very much involved, so that he was obliged to apply the proceeds of sales as he received them, not in paying the owners of the goods sold respectively out of the proceeds of their goods, but in payment of the demands of the most urgent pressing creditors of the department, the prices of whose goods had either not been recovered from the purchasers, or the proceeds whereof had been applied to the payment of other owners of goods sold. He therefore held it to have been proved that the proceeds of the plaintiffs had neither been lost nor embezzled, but had been applied by Willis, either in payment of debts due by the department to other creditors whose goods had been sold, or in payment of the percentages to Government; and, consequently, that but for this application of the proceeds of the plaintiff's goods, either the assets of Willis' estate, which Government has taken possession of, and caused to be distributed, *to the exclusion of the plaintiff*, would have been less by the amount of the plaintiff's proceeds, or, which is the same thing, that the amount of debts, for which Government would confessedly have been liable and bound to

Billingsley,
 q-q. Hawkins,
 v.
 Colonial
 Government.

discharge would have been greater, to the extent of said proceeds, than the amount of debts, which have already been paid by Government on Willis' account.

That the history of the vendue regulations of this colony clearly showed that the Government, for the purpose of raising the public revenue, had assumed the right of exclusively effecting sales by auction, and of levying a percentage on the proceeds, over and above the costs, charges, &c., of making the sales;—and that, for the purpose of inducing the public to sell by auction, and thus increase the revenue, had undertaken, in consideration of the percentage, to guarantee payment of the proceeds to the sellers, without regard to the solvency or insolvency of the purchasers or the Vendue-masters, trusting that the prudent management of the Vendue-masters,—the responsibility for all costs and losses undertaken by the Vendue-masters, in consideration of the two per cent. on the proceeds of sales allowed them,—the security found by the Vendue-masters,—the privileged hypothec which Government had over their property, (*vide* §§ 14, 198, 199, of the Instructions for the country districts,) and the hypothec and summary process of execution against the property of the purchasers (*vide ibid.* §§ 2 and 5),—would secure the Government from sustaining any loss by this guarantee held out to the sellers.

That had the Government established the vendue regulations and restrictions, without at the same time undertaking to be responsible, and holding out a guarantee for the proceeds of sales, this would have deterred and prevented the public from selling their goods by auction, and so have defeated the sole object Government had in establishing the system, namely, increasing the revenue by the vendue percentages.

That, independently of the very cogent reasons of expediency which Government had for undertaking the responsibility for the proceeds of the sales, the Government having, by law, prevented the owners of goods from selling them by auction, except through the medium of officers, called Vendue-masters, appointed by Government,—having deprived the owners of the privilege of choosing to whom their goods should be sold, and of the power of by themselves receiving or enforcing payment of the price from the purchasers, when it became due, and of demanding or enforcing payment thereof from the Vendue-master until four months after the day of sale (and prior to the issuing of the circular of 1818, until after a much longer time in some districts, even until twelve months from the day of sale), although the purchasers, by the conditions of sale, were bound to pay, and the Vendue-masters had actually received payment, at a much earlier date,—and having levied a percentage out of the proceeds of every sale,

was thereby rendered liable, in equity, to cause the proceeds of all such sales to be made good to the sellers, without regard to the solvency or insolvency of either the purchasers or the Vendue-masters.

Billingsley,
q. q. Hawkins,
v.
Colonial
Government.

That this equitable obligation on Government was so strong, and so necessary a consequence of the system established by Government, that nothing could relieve Government from it, except a positive law containing an express enactment to that effect, or a notice, made public in such a manner as that it must be deemed to be known to, and consequently to be binding on, all persons selling goods by vendue, that, *in future*, Government would not be responsible for the proceeds.

That no such law had been enacted, or notice given, prior to the date of the circular letter addressed by Government to the Vendue-masters, dated 24th December, 1818.

That the responsibility of Government was not for the first time created by this circular to the extent therein set forth. That the only provisions of this circular which had any reference to the present question had no other intent or effect in law than by restricting, by certain limitations therein expressly set forth, the absolute and unqualified responsibility of Government, which had existed before the date of this circular, to free and relieve both the Vendue-masters and Government from all responsibility for the proceeds of sales in which a longer credit than four months had been given to the purchaser, *in every case in which the price had become not recoverable from the purchaser, in consequence of his having become insolvent*, SUBSEQUENT TO THE PERIOD OF FOUR MONTHS FROM THE DATE OF THE SALE. In every other respect, the responsibility of the Vendue-masters and of the Government remained, after the publication of this circular, precisely the same, both in nature and extent, as it had been prior to its publication. *Consequently, the Government continued responsible to the sellers for the proceeds of all sales, without reference to the length of credit which had been allowed to the purchaser, in every case in which these proceeds had been actually paid by the purchaser to the Vendue-master*, and in which the sellers were prevented from obtaining payment of those proceeds, solely in consequence of the subsequent insolvency of the Vendue-master.

The proceeds of the plaintiff's goods were paid by the purchasers to Willis, the Vendue-master, and, therefore, on his insolvency, the Government, after the publication of the circular of 1818, and prior to the promulgation of the Proclamation of April, 1825, would unquestionably have been liable to make good to the plaintiff the proceeds of the sales of his goods.

He held that, as the above was the true legal construction,

Billingsley,
 J. J. Hawkins,
 v.
 Colonial
 Government.

of the terms of the circular, as originally published in 1818, the sale of the plaintiff's goods must be deemed to have been made, in every respect, in conformity with the regulations prescribed in that circular, although the 4th head of the regulations annexed to the Proclamation, and which professed to set forth the provisions of the circular, was framed so that its terms must be construed as prohibiting sellers from postponing the term of payment to them, by the Vendue-master, beyond the period of four months; because he held that the penultimate clause of the Proclamation of April, 1825: "In order that all persons may be aware of the existing regulations relative to public sales effected through the Commissaries of Vendue, or Vendue-masters, the heads thereof, with reference to the Proclamation and Instructions on the subject, are hereunto annexed for general information," had not the effect attributed to it by the defendant's counsel, and that those heads or regulations were annexed to the Proclamation merely to serve as an index, and to call the attention of the public to the Proclamations and Instructions themselves, relating to the subjects specified under each head.

He held that the letter by the Secretary to Government to the members of the Commercial Exchange, dated 28th January, 1825, having been addressed by order of the Governor to a public body, for the express purpose of being published, in order to remove doubts that had arisen as to the responsibility of Government for the proceeds of sales by vendue, was of itself sufficient to render Government responsible for the proceeds of all sales effected after its publication (which the sale of the plaintiff's goods was,) to the extent previously defined by the circular of 24th December, 1818.

He held, that if the provisions of the 3d clause of the Proclamation must be held to apply to the sale of the plaintiff's goods, then, as by its conditions *three months' credit* was given to the purchaser, Government is not now responsible to the plaintiff, for the proceeds of that sale.

The first clause of the Proclamation enacts and declares: "*that from and after the date of this Proclamation, the Government of this colony will hold itself responsible for the proceeds of all sales made on account of individuals by the Commissaries of Vendues, or Vendue-masters, in the event of the insolvency of such officers, provided such sales have been made according to law, and under the rules and regulations at present existing, or which may hereafter be proclaimed, on that head.*"

He held that while the clause above quoted contains a declaration of the responsibility of the Government to a certain extent, *from and after the date of the Proclamation*, that it is clear, from a consideration of its terms, that the

provisions which are then for the first time enacted by it, are made to take effect only from the time of its publication in the usual manner, and not from its date.

Billingsley,
q. q. Hawkins,
v.
Colonial
Government.

It is clear, from the terms used in the first clause, that the rules and regulations enacted in the 2d, 3d, 4th, and 5th clauses of the Proclamation do not come within the scope of the proviso in that clause, unless they are held to fall under the denomination either of "*rules and regulations at present existing*," or of "*rules and regulations which may hereafter be PROCLAIMED on that head*." It is impossible, according to any sound principle of construction, to hold that rules and regulations enacted for the first time in clauses 2, 3, 4, and 5 are to be deemed to be rules and regulations *described in a preceding clause*, (viz., the first,) *as at present existing*. The rules and regulations in those clauses must therefore be held to be comprehended, under the term *rules and regulations which may hereafter be PROCLAIMED*. And accordingly, the last clause of the Proclamation provides in the usual form: "And in order that no person may plead ignorance hereof, this shall be published and affixed as usual." In consequence of which, those rules and regulations, although enacted on the 22d April, would have no effect as law until after they had been duly proclaimed, and therefore cannot affect, or to any extent apply, to the sale of the plaintiff's goods, which was made before they were proclaimed.

The words used in the proviso in the first clause, "provided such sales *have been made*," cannot be construed in the perfect preterite tense, without absolutely limiting the effect of the first clause of the Proclamation to sales made before its date, which would be absurd, as it would completely defeat the object for which it is proved by the preamble that this clause was enacted.—This sentence must, therefore, be construed as if the words "*SHALL have been made*" had been used; consequently, by this clause, the responsibility of Government was not limited to *such sales as had been made prior to its date*, but was declared to extend also to *such sales as should thereafter be proved to have been made*, according to the law in force, and under the rules and regulations existing at the time when the sales were actually made. Now, as the Proclamation was not published, and therefore was not in force, at Graham's Town, until some days after the sale of the plaintiff's goods had been made, the rules and regulations which had previously been in force were, at the time the sale was made, the rules and regulations then existing at Graham's Town. And as it has already been shown that this sale was made, in every respect, in conformity with and under these previous rules and regulations, it has been proved to be one of that class for the proceeds of which

Billingsley, it was enacted and declared in the Proclamation that the
 q.q. Hawkins, Government should be responsible.

v.
 Colonial
 Government.

He held that the provisions of the second clause of the Proclamation came into operation and had effect as law from and after the date of its promulgation; and therefore that, as it admitted that the plaintiff did not report in writing to Government the default of the Vendue-master until the 4th October, being the eighth day after the 26th September, when the demand for payment had been made, and then made the report directly to Government in Cape Town, and not in the first instance to the Landdrost of Albany,—it follows that, if the provisions of the second clause of the Proclamation are to be enforced against the plaintiff according to the strict letter of that law, he has thereby forfeited all claim against Government for payment of the proceeds of the sale of the goods, for which Government would otherwise have been legally responsible. But he held that, as it had been proved that the plaintiff gave notice to Government of the default nearly a week sooner than Government could possibly have received it, if the plaintiff had made the report to the Landdrost, within the period allowed him by law for that purpose, and that Government had already, on the 29th September, sent instructions to the Landdrost to suspend the Vendue-master, and as it has been admitted that Government has not sustained any loss in consequence of the report having been made directly to Government, instead of to the Landdrost,—it was clear that the object, for the attainment of which the second clause of the Proclamation had been enacted, had been as completely attained by what the plaintiff actually did do, as if these provisions had been strictly complied with by him.

He held that, as it had been proved beyond doubt that the proceeds of the sale of the plaintiff's goods had been received by the Vendue-master, and proved to his satisfaction that the amount of these proceeds has actually been *in rem versum* of Government, and, consequently, that if the claim of the plaintiff be not sustained, Government will be benefited at the expense of the plaintiff in the whole amount of the net proceeds of the plaintiff's goods,—it was clear that Government, by attempting to enforce the forfeiture of the plaintiff's claim, according to the strict letter of the law, were endeavouring, *non ad damnum evitandum, sed ad lucrum captandum*.

For the loss which Government is seeking to avoid is one which has not been occasioned by anything connected with or arising out of the transaction respecting the sale of the property, but entirely in consequence of transactions between its own agent, the Vendue-master, and other parties. Consequently, the Government is seeking to appropriate the property of the plaintiff, now in its possession, to save

Government from a loss which has arisen by no fault or act of the plaintiff, out of transactions to which he was no party, and with which he had no concern.

Billingsley,
q.q. Hawkins,
r.
Colonial
Government.

He held that it had been proved that Government, after it must have been fully aware that Willis, by his improper and injudicious management, had brought the affairs of the vendue department of Albany into a state of embarrassment, if not insolvency,—had, by continuing him in office, enabled him to receive and appropriate to the use of the vendue department the proceeds of the plaintiff's property, and had prevented the plaintiff from taking any measures for securing his property, or preventing its being appropriated to the payment of other claims, for which Government was responsible.

On these grounds, he held that, although the strict letter of the law may be adverse to the claim of the plaintiff, yet that his claim is well founded in equity.

He stated that he had been unable to discover any principle which, under all the circumstances above referred to, could compel him to decide that the plaintiff, who was induced to sell his property by vendue on the faith of the absolute and unqualified guarantee for the proceeds which Government had undertaken to give to the sellers, in consideration of the percentage on the proceeds levied by Government, should, after Government had received the stipulated percentage on the proceeds of his goods, and after the proceeds themselves had actually been received by the agent appointed by Government, and by him applied for the benefit of Government, be debarred of his right to demand restitution of those proceeds from Government, and should be made to forfeit his property to Government, merely because he had reported the insolvency of the Vendue-master,—whom Government had suffered to receive the plaintiff's property at a time when it knew him to be in embarrassed circumstances,—directly to Government in Cape Town, instead of to the Landdrost in Albany,—although the report thus made reached Government at an earlier date than it could possibly have done if transmitted through the Landdrost,—although it is admitted by Government that no loss or damage had been occasioned by the mode in which the report was made,—although, prior to the sale of his goods, the plaintiff had neither been called on, nor had agreed or undertaken, to make any such report, as the condition on which Government was to guarantee to him payment of the proceeds of his goods,—and although the insolvency of the Vendue-master had actually been known to Government, and instructions had been issued by Government to suspend him from his office, on account of that insolvency, several days before the time when, by the provisions of the Proclamation, the plaintiff was required to make any report whatever on the subject.

ORPHAN CHAMBER *v.* TRUTER, ATTORNEY.

[30th June and 1st Sept., 1830.]

*Attorney.—Damages for misconduct, recoverable by Action, not by Motion.*Orphan
Chamber
v.
Truter,
Attorney.

In this case a motion was made, at the instance of the Orphan Chamber, that the defendant, an attorney of the Court, should be adjudged to pay to the applicants the costs incurred by them,—in a suit which had depended between them and a slave named Regina, in which action the respondent had been the attorney of Regina,—in respect of his alleged misconduct in conducting that action.

Affidavits were put in on both sides.

[*Cur. Adv. Vult.*]1st September,
1830.

Postea.—The Court held that a claim of the nature of the present could not competently be made by motion, but only by an action; and therefore dismissed the application; but it appearing to the Court, from the affidavits, that the respondent's conduct had been reprehensible, adjudged him to pay to the applicants the costs of the motion. [The case was not again brought into Court.]

NIEKERK *v.* NIEKERK.

[30th June—9th December, 1830.]

Co-guardians—as to their liability “in solidum” towards Minors. Interest,—whether in a case of Minors can exceed Capital.

Niekerk
v.
Niekerk.

This was an action, at the instance of the children of H. Niekerk, for the sum of £173 1s. 3½d., as their shares, as heirs by representation of their said father, of the inheritance of Aletta Heyns, their paternal grandmother, against the defendant, as one of the executors of her estate, and one of the guardians of the said minors, and as having administered the estate, along with the other executors and guardians.

The defendant admitted that the sum claimed was that to which the plaintiffs were entitled out of the estate of their grandmother; that he had been instituted one of the executors of the estate of Aletta Heyns, and one of the guardians of the plaintiffs; but denied that he had administered the estate in his aforesaid capacities, and therefore maintained that he is not liable to this action, so long as the plaintiffs shall have failed to obtain from the administering executor and guardians the amounts of their respective claims, and therefore prayed for absolution.

2dly. That the amount of their respective inheritances was duly put out at interest by the administering executor and guardian, the late F. Dreyer, and that the plaintiffs did not, when they severally became of age, demand, from the said administering executor or his representative, the amount which had become due to them, and that by reason of such neglect the defendant is released from all further liability on this claim.

Niekerk
v.
Niekerk.

After evidence had been led, Joubert, for the plaintiffs, maintained that as the will in question does not appoint any separate administering guardian, according to law, there is no distinction among them, but each is liable *in solidum*, unless relieved by the judge. Lybrechts Reden. Vert., vol. 1, c. 30, n. 66, p. 509; Utr. Consult., vol. 1, cons. 107, n. 6; Voet 27: 8, 6; Dutch Consult., vol. 4, cons. 346, No. 21; Van Leeuwen, Cens. For., pt. I., l. 1, c. 18, § 14; R. D. L., l. 1: 16, § 12, *in fine*, Eng. ed., p. 98; l. 3, Cod. *de divid. tut.*, Cod. lib. 5, tit. 52.

The Court held that where there are several guardians appointed by will, they may, by a private arrangement, agree that the guardian who has administered must be first discussed, before any action can be brought against the non-administering guardians to make good the loss which has resulted from any thing which the administering guardian has done; but with regard to losses occasioned by omissions, all the guardians, whether they have administered or not, are liable *singuli in solidum*, and although they can claim the *beneficium divisionis inter se*, none of them can claim the *beneficium excussionis* of any one of the others. (Voet, *ibid.*; and *vide* Niekerk v. Letterstedt, 2d September, 1831, *post.*)

The Court held that the least act of administration respecting the estate of a minor renders the person who commits it an administering tutor, and deprives him of the benefit of claiming a previous excussion of the other administering tutor or tutors. Van Leeuwen, Cens. For., pt. I., l. 1, c. 18, § 15.

The Court held that, by making himself a party to and signing the liquidation account of the estate, the defendant must be deemed to have been an administering tutor, and that the evidence for the defendant only proves that, having administered to a certain extent, the defendant either by mandate entrusted the administration *quoad ultra*, to his co-tutor Dreyer, or that he gave up the administration to Dreyer, after having administered to a certain extent; in either of which cases he is not entitled to claim the privileges of a non-administering tutor. Voet 27: 8, 6; Van Leeuwen, Cens. For., pt. I., l. 1, c. 18, § 15.

Niekerk
v.
Niekerk.

As to the second defence, the *Court held* that if Dreyer, or any of the other two guardians, were insolvent at the time when, by reason of their coming of age, the plaintiffs were entitled to have brought their *actio tutelæ* against those guardians, the defendant may now be called on to pay every deficiency which has been occasioned by the mal-administration of the estate, reserving to him his right of relief, *pro rata*, against his co-guardians who are solvent; but that, if any of the co-guardians who were solvent at the time of the expiry of the guardianship, consequent on the majority of the plaintiffs, have since become insolvent, the amount of their share of the deficiency must be deducted from the amount of the claim of the plaintiffs, and the loss which has thus been occasioned by the delay of the plaintiffs must fall on them, and not on the defendant, who, by the delay of the plaintiffs, has been prevented from operating his relief from the co-guardians who were solvent at the expiry of the guardianship, but have since become insolvent. Voet 27: 8, 6; Van Leeuwen, Cens. For., pt. I., l. 1, c. 18, § 16.

The second ground of defence was afterwards abandoned by the defendant, and judgment was given for the plaintiffs, as claimed.

15th October,
1830.

Postea.—The defendant consented to execution being issued for the amount of the capital, with interest equal to the amount of the capital, but objected to the farther claim for interest.

9th December,
1830.

Postea.—Cloete moved that the judgment of the Court of the 30th June last should be amended, by restricting the interest awarded to interest for 16½ years, so that the total amount of such interest should not exceed the amount of the capital sum, and quoted Van der Linden's Inst., p. 219, Eng. ed.; Voet 22: 1, 19, *et auctores. inibi cit.*; 27: 3, 8; 26: 7, 9, 10; Van Leeuwen's Commentaries, b. 4, c. 7, § 5, p. 341, Eng. ed.

Joubert, *contra*, contended that, although the rule founded on by the defendant applied in the case where a major creditor allowed the interest to run in arrear to a greater amount, yet it did not to a case like the present, where the sum claimed was the principal sum due to the plaintiffs, as their inheritance, together with the interest, which ought to have been made on that principal sum.

The *Court held* the rule of the Dutch law to be clear, that interest could not be claimed, *even from a guardian*, to a greater amount than that of the capital on which the judgment arose, and ordered the judgment to be amended, as prayed, each party to pay his own costs incurred as to this application.

MACKAY v. PHILIP.

[5th July—16th July, 1830.]

Libel.—*What publication*,—"animus injuriandi—veritas convicti."

"Exceptio declinatoria fori,"—for publication of *Libel*.

Appeal—of "*exceptio fori*" refused.

This was an action, brought by the plaintiff, to recover £1000 damages.

Mackay
v.
Philip.

The declaration set forth that the defendant, *intending* to injure the said plaintiff, in his good name, fame, credit, and reputation, &c., &c., in or about the month of April, 1828, did compose, write, edit, and publish, or cause or procure to be written, edited, and published, a certain book, entitled "*Researches in South Africa*," &c., &c., and which has been read and circulated in this colony, and which said book, contains the false, malicious, and defamatory libellous matter, of and concerning the said plaintiff, as follows, that is to say:—

"The following statement, which relates to a period so recent as December, 1825, has been *communicated to me* by a gentleman of the highest respectability, *who was in that part of the country when the occurrence he relates took place*, and *who learned the facts from the undoubted authority* of some of the *local functionaries* on the spot. The landdrost of Somerset (meaning the said plaintiff) had some time previously sent a Hottentot with his wagon (meaning the plaintiff's wagon) to bring some goods for him (meaning the said plaintiff) from another village. Unfortunately for the Hottentot, there happened to be a *small cask of Cape brandy* among the goods, and though *in other respects a useful and faithful* servant, he (meaning the said Hottentot) could not resist the temptation *thus placed within his reach*: he tapped the barrel, and drank *part* of the liquor. The theft was readily discovered, and the culprit (meaning the said Hottentot) was punished by flogging and imprisonment. Most masters would have been satisfied with this, but not so, *this worshipful* magistrate (meaning the said plaintiff). He (meaning the said plaintiff) only released the man from prison *in order to place him, together with his wife and family, under contract* to a person in the village, (such being the powers with which such functionaries are vested,) for a period of *three years*, at the rate of ten rixdollars (fifteen shillings sterling) per annum, with the further proviso that no part of this pittance of wages should go to the Hottentot or his family, but that the whole amount for the three years' servitude (thirty rixdollars in all) *should be paid over in advance by the new*

Mackay
v.
Philip.

master to himself, the magistrate (meaning the plaintiff), in compensation for the brandy which the Hottentot had drunk* (meaning thereby that the plaintiff had abused the powers with which he was vested, and exercised the same for his own private ends and advantage, and not in the due course of justice). The wages which this same Hottentot had for several years received from Mr. Hart before he came into the landdrost's service (meaning the service of the said plaintiff) and which he could still readily obtain in the district, if left at liberty to hire himself, was *fifty rixdollars per annum*, a suit of clothes, and *provisions for his family*. In Albany any respectable Hottentot family could, at that time, obtain ten rixdollars per month and provisions; many earn much more.

"This same magistrate (meaning the plaintiff) had also *managed* (thereby inferring that the plaintiff had unlawfully exercised the power with which he was vested) *to get two other Hottentot families placed under contract to himself for a term of three years*, at the rate of fifteen rixdollars per annum for each family. Nevertheless, these same individuals had received the preceding year, from Mr. Hart, and might still readily obtain in the neighbourhood, *if left to their free disposal, fifty rixdollars per annum*, with provisions and clothing. *Such are some of the effects of magisterial influence at the Cape, as exercised on the Hottentot race.* Such stories have been often told of the Dutch boers and functionaries; but the *functionary in question* was neither a Dutchman nor an African, but a British military officer (meaning the plaintiff) and a special favourite at that time (meaning the time at which the said supposed oppression of the plaintiff is alleged to have been committed) of the Colonial Government."

To this declaration the defendant filed the following exception, viz:—"And the said John Philip, &c., comes, and without entering upon the merits of the complaint set forth in the said declaration, says that this Court ought not to have or take further cognizance of the action aforesaid, because he says that the said supposed grievances, or causes of action, and each and every of them, so far as the same are charged in the said declaration to have been committed by the defendant, were committed out of the jurisdiction of this Court, to wit, in the city of London, and not within the colony of the Cape of Good Hope. Wherefore he says the said action ought to have been instituted in the Court of King's Bench, or some other Court in England, and he pleads the *exceptio declinatoria fori*, and prays absolution from this action, with costs."

* A cask of Cape brandy, called a half-aum, and containing 19 gallons, may be purchased in any part of the colony at from twenty to thirty rixdollars.

Postea.—The Attorney-General, for the plaintiff, objected that the exception was not raised on any fact avowed in the declaration, but on a fact *assumed* by the defendant, and denied by the plaintiff; for the plaintiff denied “that the grievances or causes of action, as charged in the declaration to have been committed by the defendant, were committed by him in the city of London, and not in the colony of the Cape of Good Hope;” and contended that, before the question of law on the exception could be raised, an issue must be taken on the facts in dispute.

Mackay
v.
Philip.
23d Dec. 1830.

The Court held that the exception was bad, because it was not taken on any fact averred in the declaration, or admitted by the plaintiff, and allowed the defendant till Monday next to amend his pleading.

Costs to be costs in the cause.

The defendant filed an amended exception:—“And the said John Philip, &c., comes, and without entering upon the merits of the complaint set forth in the said declaration, says that this Court ought not to have or take further cognizance of the action aforesaid, because he says that, admitting that the defendant, as pleaded in the said declaration,—‘In or about the month of April, 1828, did compose, write, edit, and publish, or cause and procure to be written, edited, and published, a certain book, entitled as set forth in said declaration,’ yet the said book was so as aforesaid written, edited, and published out of the jurisdiction of this Court, to wit, in the city of London, and not within the colony of the Cape of Good Hope. Wherefore he says the said action ought to have been instituted in the Court of King’s Bench, or some other Court in England, and not before the Supreme Court of this colony; the defendant therefore concludes by pleading the *exceptio fori declinatoria*, and prays the same may be admitted, and the defendant absolved from this instance, with costs.”

The plaintiff’s replication:—“And the said W. M. Mackay, for replication to the exception or plea of the said defendant, by him pleaded, saith that it may be true, for any thing he, the plaintiff, knows to the contrary, that the said book, in the said declaration mentioned, was written and edited in the city of London, and not within the colony of the Cape of Good Hope;—and the said plaintiff reserves (if need be) his right to show that, therefore, this Court is not ousted of its jurisdiction in the matters aforesaid. And the said plaintiff saith that the said defendant did publish, or cause and procure to be published, within this colony, the said book; and this the said plaintiff is ready to verify. Wherefore he prays that the said exception may be dismissed with costs.”

The defendant’s rejoinder:—“The defendant and exceptor,

Mackay
v.
Philip.

rejoining to the new matter and allegations contained in the plaintiff's replication to the exception, saith that the defendant and exceptor ought not to be debarred from pleading his exception, by reason of anything contained in the replication to the exception, as the plaintiff did not allege or set forth that the said defendant did publish, or cause and procure to be published, within this colony, the said book, as the grounds or cause of his action. Wherefore the defendant persists for rejoinder."

Thereafter, the attorneys for the respective parties above named consented and agreed (by a minute signed by them,) that the pleadings in this cause on the exception taken by the abovenamed defendant shall be considered closed.

11th March,
1830.

Postea.—The case having been set down for trial by the parties, the plaintiff called:—

W. Bird.—"I have seen a book, stated to have been written by the defendant; and entitled, 'Researches in South Africa.' I saw it for the first time in the Public Library, I think in August or September, 1828, and read the contents. I have a printed copy in my possession. When Dr. Philip arrived from England, I called on him, and he returned my visit, a few days after, at my office, in the Custom-house. I was not then in my office, but Dr. Philip left with my clerk a closed and papered parcel, which the clerk delivered to me on my return. I opened the parcel, and found it contained two volumes of the 'Researches,' purporting to have been published in 1828. No letter or note accompanied the volumes, but there was a manuscript address, written on the first leaf. (The volumes were here produced by the witness, and the address in manuscript was found to purport that Dr. Philip had presented the work to witness.) I had read the book some time previously. After the work had been left by Dr. Philip at my office, I saw him on the same day, when he told me, that the book was not intended for sale in this colony. I have no doubt but Dr. Philip knew of my having received the volumes. I have no doubt about our having talked about the books left by Dr. Philip at my office; but I am to be understood as having had more than a single conversation with Dr. Philip."

Cross-examined by Cloete.—"I have been on intimate terms with Dr. Philip and his family. I remember, on a former occasion, presenting him with a book, but I cannot tell the defendant's motive for presenting the volumes in question to me, unless it was a friendly one. The publication excited general attention, but I cannot tell by how many persons it may have been read in the library. When I first read the 'Researches,' Dr. Philip was not in the colony."

George Greig, sworn.—“There was some time since a work, entitled ‘Researches,’ &c., in my circulating library, but it is no longer there. I presume its circulation was extensive, but I am not certain of the fact being so. I received it from my general agent in England, who is not in the book-selling trade.”

Mackay
v.
Philip.

Cross-examined by Cloete.—“I received the work about the middle of the year 1828. I am acquainted with Dr. Philip, who was not then in the colony. I have reason to think he was then in England. My agent in England is in the habit of forwarding to me books of recent publication. The work in question came to my address with other works, and was not sent to me as a present. I doubt not but it was inserted in a general invoice. I received only the one copy. I remember one other copy being sold at the Commercial Exchange, by auction, and I think it went at a very high price. I have removed the copy sent me by my agent from the circulating library to my own private book-case. I have never seen a number of copies of the work together. I have, however, seen other copies than those I have mentioned, but I think, in all, fewer than half-a-dozen.”

By the Court.—“I believe Dr. Philip has a house and family in Church-square, in the London Missionary House. Dr. Philip bears the character of Superintendent of the London Missionary Society. Dr. Philip lived in the same house before he left the colony.”

Cloete, for the defendant, contended that the publication in question had been written and published in London, for the sole purpose of advocating the cause of a depressed and degraded class of people,—that his client had not been the first publisher of the work in this colony; that copies had been privately received by one of the most respectable booksellers here, and by others, long previous to Dr. Philip’s return, and the action ought, therefore, to have been brought against the first publishers, and not against his client. He then said that, there being no proof of publication in this colony, but only in England, the plaintiff’s remedy lay in the King’s Bench, where the defendant might be able to justify himself by English law, although he might not be in a situation to do so by the law of the colony. Where an action *ex ratione delicti* originated, there should it be tried, and a plaintiff could not be permitted to pounce on a defendant, in such cases, wherever he found him. His client had always had a fixed abode in England, and was only here *pro tempore*, for purposes of humanity, and therefore the process ought to have commenced by arrest, in order to bring him within the jurisdiction of the Court, as no fixed domicile had been proved in evidence.

The Chief Justice observed that the Court had been

Mackay
v.
Philip.

desirous of affording every proper latitude to the arguments of the defendant's counsel, otherwise the exception did not seem of itself entitled to much consideration. Both the plaintiff and the defendant in this case were so far resident, as clearly to render them amenable to the jurisdiction of the Court. If the reverend gentleman had passed a promissory note in London for a sum of money due to another, it would be absurd to assert that the holder could not recover, except in the King's Bench. It was unreasonable to consider the case before the Court of a criminal nature. He concluded by declaring his opinion, that the exception ought to be set aside as invalid, with costs, and that the defendant should be required to answer over.

Burton, J., regretted that the parties had not accommodated matters in an amicable manner; but since they had determined on appealing to the law, the question must be tried as a question of law. Exceptions to the jurisdiction of courts of justice were frequently called dilatory pleas, because they were mostly intended for the purpose of gaining time; but in every point of view, the Cape of Good Hope was the most convenient place for the investigation of the present case. The character of the respectable defendant was not so much the question; but the plaintiff sought redress for an alleged aspersion of the defendant, and it would be hard if he had to drag his witnesses hence to London, at an enormous expense. A man might have many domiciles, and the evidence of Mr. Greig had clearly proved that of the defendant. Proof of publication in this colony, he considered unnecessary, and the publication in England had been fully proved. A writer was responsible everywhere; as if a man fires off a gun and it hits at the distance of a mile, he is equally liable for the consequences as if the bullet had taken effect at the mouth of the piece. He held the exception invalid.

Kekewich, J., fully accorded in opinion with his brother Judges. It would be monstrous if a person might go over the frontier, to the Orange River, for instance, or run down to St. Helena, and at either place publish a libel with impunity.

11th March, 1830. The judgment of the Court (Menzies, J., absent on Circuit), was, "Exception overruled. Defendant to pay costs, and to answer over to the declaration."

23d March. Thereafter, the defendant presented a memorial, and moved the Court for leave to appeal against the above judgment.

Application dismissed, with costs. (Menzies, J., absent on Circuit.)

27th March. Thereafter, the defendant filed this plea to the declaration: "And the said defendant, &c., &c., comes, &c., and says he is not guilty of the said supposed grievances above laid to

his charge, or any or either of them, in manner and form as the said W. M. Mackay hath above thereof complained against him.

Mackay
v.
Philip.

"And for a further plea in this behalf, he saith that the said W. M. Mackay ought not to have or maintain his aforesaid action against him, because he says that the whole of the matter complained of in the said declaration as libellous was composed, and put into the hands of the defendant, by John Pringle, of London, now or late Secretary to the Anti-Slavery Society, in whose veracity the defendant had good reason to place confidence, and that the same was so published by him, the defendant, without any the most remote desire or intention of injuring the plaintiff. And that the defendant, whose name is not mentioned in the publication complained of, under a firm conviction that the contents thereof are true, and in furtherance of a lawful object, did so publish the aforesaid statements, which the defendant maintains he was lawfully entitled to do. And this the said John Philip is ready to verify. Wherefore the defendant prays for judgment against the plaintiff, with costs."

To this plea, the plaintiff filed the following replication:—
"And the said plaintiff, as to the plea of the said defendant, by him first above pleaded, and whereof he hath put himself upon the judgment of the Court, doth the like.

3d April.

"And the said plaintiff, as to the plea of the said defendant by him next above pleaded, excepts thereto in law, because the said plaintiff says there is nothing in the said plea contained whereby the defendant can justify the matters complained of against him in the said declaration."

On the 16th April, an order was made by a Judge at Chambers, whereby "leave was given to the defendant to amend his plea, with costs to the plaintiff."

Thereafter, the defendant filed the following amended plea:—
"And the said defendant, &c., &c., comes, &c., and says he is not guilty of the said supposed grievances above laid to his charge, or any or either of them, in manner and form as the said W. M. Mackay hath above thereof complained against him.

20th April.

"And for a further plea in this behalf, saith that, admitting that the said defendant did compose, edit, and publish the book mentioned in the plaintiff's declaration, and that the said book contains the matter recited in the said declaration, he saith that the several parts therein stated of and concerning the plaintiff were and are true, and this the defendant is ready to verify. Wherefore he prays judgment against the said plaintiff, with all costs of suit."

Thereafter, the plaintiff filed the following replication:—
'And the said plaintiff, as to the plea of the said defendant,

22d April.

Mackay
v.
Philip.

by him first above pleaded, and whereof he has put himself upon the judgment of the Court, doth the like. And as to the plea of the said defendant by him secondly above pleaded, the said plaintiff saith that he, by reason of anything by the said defendant in the said plea alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, in respect of the grievances in the introductory part of that plea mentioned, because he saith that the said defendant, of his own wrong, and without the cause by the said defendant in the said plea mentioned, did commit the said grievances in manner and form as the said plaintiff hath above thereof complained against the said defendant; and thereupon the said plaintiff joins issue with the said defendant."

After the evidence had been led at the trial, the Attorney-General proposed that the defendant's counsel should sum up first in support of his plea of justification.

The *Court held* that it was for the plaintiff to sum up first, the general issue having been pleaded, which gave the defendant the right to the reply.

12th July. After hearing the counsel on both sides the *Court held* that the matter alleged in the declaration to be libellous, and proved to have been published by the defendant, both in England and in this colony, was in its nature libellous, and sufficient to found an action for damages; that it applied, and had been intended by the defendant to be applied, to the plaintiff.

The *Court held* that, even if the defendant had proved what he has alleged, but totally failed to prove, namely, that he was not the original author or inventor of the statement contained in the paragraph complained of, but only published what was communicated to him by his friend, Mr. Pringle, Secretary to the Anti-Slavery Society, that yet, by the law of this colony, this fact, even if it had been proved, could afford him no available defence against the plaintiff's claim for damages, on account of the injury which he has sustained by the publication. (*Vide Voet 47: 10, § 9, in fine.*)

The defendant's counsel had failed to establish the defence maintained by him, namely, that there is no proof in this case of any *animus injuriandi*, of any intention on the part of the defendant to injure the plaintiff, and that, therefore, on the authority of Voet 47: 10, § 20, he ought not to be found liable in damages for anything which he may have published of and concerning the plaintiff.

Because he has failed to show that the statements injurious to the character of the plaintiff published by him were published under any of the circumstances in respect of which Voet declares that the absence of all intention to injure is to be held as proved or presumed. (*Vide Haupt v. Finlayson, 12th December, 1844, post.*)

On the contrary, this case, even as represented by his counsel, is very analogous to one as to which it is declared that the *animus injuriandi* is to be presumed. (*Vide Voet 47: 10, § 20, nec aliud dicendum.*)

Mackay
v.
Philip.

Both common sense and the law of this colony dictate that the existence or absence of the *animus injuriandi* must be gathered from the circumstances of each particular case; and the Court held that the falsehood of the statements injurious to the character of a plaintiff, which have been published by a defendant, is, in the *actio æstimatoria*, or civil and equitable action for the reparation of the injury thereby caused of itself, sufficient to prove such an *animus injuriandi*, direct or indirect, as is required to render the defendant liable in damages, unless he shall be able to prove some special circumstance sufficient to negative the presumption of the existence of such *animus injuriandi*, and to prove that, in publishing injurious statements, not consistent with truth, he was actuated by some motive, which is in law held sufficient to excuse the error into which the defendant has fallen. The defendant has failed to do this, and the defence which he has attempted to found on the alleged absence of all *animus injuriandi* on his part cannot avail him, unless, under his plea in justification, he shall have succeeded in proving the *veritas convicii*; but if he had succeeded in proving the *veritas convicii*, then he would have been entitled to be absolved from this action, because this is a case in which the truth of the statements, alleged to be injurious, does, according to every principle of law, completely justify the defendant in having published them. For the plaintiff was a public officer, the acts imputed to him were acts committed by him while in the execution of this public office, and they were of such a nature as, if committed by the plaintiff, to make it the right, nay the duty, of every honest man to publish the official misconduct of the plaintiff, and, through the powerful medium of the press, to rouse the public voice to convey to the ears of Government—which the voice of a private individual might be too feeble to reach—that complaint and information respecting the conduct of the plaintiff, which would be sufficient to cause the plaintiff to be deprived of those powers which he had abused, and to procure an end to be put to that system which afforded opportunity for the existence of such abuses. But the Court held that, not only had the defendant failed to prove his plea of justification, but that the evidence disproved the truth of every material allegation in the libel.

The defendant's counsel referred to Voet 47: 10, § 9, *Si enim, &c.*, and maintained, on the authority of this passage, that having proved a part of his allegation to be true, he ought to be absolved from the plaintiff's claim for damages.

Mackay
v.
Philip.

The *Court held* that no effect can be given to this argument, because 1st, in the first place, the passage in Voet applies to what shall be a defence against the penal *actio injuriarum* for a *malicium*, and not to the *actio aestimatoria*, or civil and equitable action for reparation, and, 2dly, because, even if this were not the true construction of that passage, the defendant has failed to prove the truth of any part of the libel. He has proved the truth of certain facts mentioned in the passage containing the libel, but he has utterly failed to prove the truth of any of the injurious and libellous statements contained in the paragraph complained of.

On these grounds the *Court held* that the defendant has completely failed in the defence, which, under his plea of justification, he has endeavoured to substantiate, and gave judgment for the plaintiff, damages £200, with costs, and ordered the costs to be taxed in such a manner as to show the way in which the large bill of costs in this case has been incurred, in order that what has been occasioned by the vexatious and improper proceedings of the defendant may not be attributed to the fault of the system at present in force in this colony.

NISBET & DICKSON, q.q., v. COOKE.

[1st September, 1830.]

Provisional Case.—Sentence refused on Accounts-Sales,—Witness examined in defence.

Nisbet &
Dickson, q.q.
v.
Cooke.

Provisional sentence was claimed in this case, for a balance appearing due by accounts of sales, rendered by a commission agent to the plaintiffs, his constituents, and was refused, without costs; in respect that the defendant produced his letter-book and bill-book, showing that since the constituents had sent instructions to the q.q. plaintiffs to sue the defendant, the defendant had remitted two bills for more than the amount of the balance claimed.—It was proved by a witness (Twycross) that the bill-book and letter-book produced were in the handwriting of the defendant and his clerk (who had left the colony four months ago), and that the defendant had actually had in his possession the bills mentioned, and that the bills were good bills.

HAWKINS v. MUNNIK.

[2d September, 1830.]

*"Servitude aquæ Haustus,"—implies right of Way to Fountain,
—cannot be impaired by a merely "personal" agreement.*

This is an action brought by the plaintiff to have the defendant condemned to allow the plaintiff, as proprietor of the place called *Rouwkoop*, to cause a footbridge across the river Liesbeek, and between the place *Rouwkoop* and that of the defendant, to be repaired or replaced, or a new bridge to be erected upon such other spot as may be agreed upon between the parties, so that the proprietor of *Rouwkoop* for the time being and his servants may pass to and from the place *Rouwkoop* to the spring or fountain on that place of the defendant, to draw drinkwater, from which the proprietor of *Rouwkoop* has a right of servitude.

Hawkins
v.
Munnik.

The defendant, in his plea, admitted that the proprietor of *Rouwkoop* has a right to take drinkwater when and as often as he, the plaintiff, may think fit, from the fountain situated on the lands of the defendant; but maintained that the plaintiff has no right, title, or privilege to a way or footbridge over the Liesbeek river to the place of the defendant; and stated that the place of the defendant and that of the plaintiff are situated next to one another, and in the year 1815 belonged to one and the same proprietor; that, at the decease of the said proprietor, his executors caused each place to be put up separately, and as there was at that time a bridge standing over the Liesbeek river, it was proclaimed by the auctioneer, at the commencement of the putting up of those places "that the bridge then laying across said river should not remain, but that the purchaser of the lower place, being that of the defendant, should take the same away or demolish it, and that there was to be no servitude of a bridge upon either of those places;" that the bridge, after the sale, was taken away and removed by the defendant, and that, subsequently, the defendant for his own convenience erected a temporary bridge, without thereby constituting any right in favour of the plaintiff.

The plaintiff put in the deed of transfer by the executors of Arend Munnik (the former proprietor of both the plaintiff's and defendant's places), in favour of the author of the plaintiff, ceding and transferring the place *Rouwkoop*, "under the express conditions that the owner or the subsequent possessors of this place shall have the right to have their drinkwater fetched from the fountain situated on the property of J. G. Munnik, as also, that the said water may be led out of the said fountain to this place after having, however, served for the complete

Hawkins
v.
Munnik.

use of the possessors of the place of J. G. Munnik, and this in such a way as can be agreed upon between them, without damage to the possessors." He also put in the transfers by which the place *Rouwkoop* was transferred to the different proprietors to whom it had been transferred prior to the transfer in favour of the plaintiff, as also the transfer in his own favour, all referring to the conditions of the transfer above quoted.

Thereupon the Court stopped the plaintiff, and after hearing Brand, for the defendant, *found* that the deed of transfer by the executors constituted an unqualified right of servitude to take drinkwater.

That this servitude implied a right of way in favour of the proprietor of the dominant tenement to the fountain,* and when the dominant and servient tenements are on different sides of a river forming the boundary between them, that the said servitude implies a right to a footbridge over the river; and that an unqualified right of servitude duly constituted by the transfer and title deeds of the land cannot be limited or impaired in the person of a singular successor by any merely *personal* agreements between the granter of the servitude and the person in whose favour the servitude was granted, or any person subsequently acquiring the servient tenement from the granter.†

Judgment for the plaintiff, with costs; with a reference to arbiters, to be named by the parties, as to the spot most convenient to both for the site of the bridge.

KOTZE v. MEYER.

[7th September, 1830.]

Surety,—although Co-principal Debtor,—released by the Creditor having lost the special Mortgage in the Bond, by neglect of registry.

Kotze
v.
Meyer.

For the facts of this case, *vide* in *re* Wahl, Meyer v. Deneys and others, 15th June, 1830, p. 433.

The present action was brought by the creditor in Wahl's bond against Meyer, the surety in the bond.

Meyer defended himself on the ground that, by the neglect of the creditor in not duly registering the bond, he had not only himself lost the benefit of the mortgage of the slaves, but deprived the defendant of the benefit of the same mortgage

* Ita Voet 8: 4, 16.

† Voet 8: 1, 6.

which he would otherwise have enjoyed, in virtue of the *beneficium actionum cedendarum*, to which, as a surety, he was by law entitled.

Kotze
v.
Meyer.

To this it was replied that the defendant had bound himself, not merely as a surety, but also as a co-principal debtor, and that he was now sued as co-principal debtor; that a co-principal debtor was in the same situation as the actual principal debtor, and that, as the principal debtor, if he had been sued, could not have maintained the defence urged by the defendant, it was not competent for the defendant to do so. Pothier Contr. vol. 1, p. 262.

The Court unanimously sustained the defence, and refused the provisional claim, with costs; as they afterwards also did in a similar case, *Smuts v. Kotze*, 30th November, 1836. (*Vide Meyer v. Low*, 29th June, 1832; *Watermeyer v. Theron*, 5th February, 1833; *Colonial Government v. McDonald and Breda*, 27th May, 1836).

HORSTOCK v. BONIFACE, BRED, AND NEETHLING.

[7th September, 1830.]

Libel,—application to a particular person how proved.

Pleadings,—what uncertainty in Plea.

Witness, refusing to answer, as he might criminate himself.

This was an action for damages brought by the plaintiff against the defendants as being respectively the editor, printer, and publisher of the *Zuid-Afrikaan* newspaper, for having composed, written, edited, printed and published, or caused or procured to be composed, &c., &c., in the *Zuid-Afrikaan* newspaper of the 18th June, 1830, the following false, scandalous, &c., &c., of and concerning the plaintiff, that is to say :—

Horstock
v.
Boniface,
Breda, and
Neethling.

“Singular Epitaph on a Quack Doctor.—Hereunder rots the corpse of Lubbert Marmoriset (meaning thereby to designate the said plaintiff), escaped, God knows whence, as village or ship barber; Roman Catholic layman, yea, half priest, vile hypocrite, defamer of his wife, that faithless proselyte, too stupid even for the syringe, run-away hospital nurse, useless either to man or beast, pitiful scribbler; in short, here is a quack, a man murderer.”

The defendants' plea and answer :—“The said defendants admit that they are respectively editors, printers, and publishers,

Horstock
v.
Boniface,
Breda, and
Neethling.

of the *Zuid Afrikaan*, and say that they are not guilty of the said supposed grievances complained of, inasmuch that the epitaph placed in the said paper is no libel upon, nor meant by the defendants to be a libel of, or in the least concerning the plaintiff, nor did the defendants, by placing the said epitaph in the said paper, mean to describe the plaintiff in any way. The defendants further say that the said epitaph was neither composed or written, nor caused to be composed or written, by them, or any one of them, but they say that the person who caused the said epitaph to be printed in said paper, or who otherwise procured the said epitaph for the said paper, is an individual named Bernardus Josephus van de Sandt."

Exception to the defendants' plea:—"And the said plaintiff says that the said plea is inartificially drawn and uncertainly pleaded, so that the plaintiff doth not know what fact or facts the said defendants thereby mean to put in issue, and, moreover, contains irrelevant and immaterial matter. Wherefore the plaintiff prays that the said plea may be expunged, with costs, and the defendants decreed to answer over."

The defendants' reply to exception:—"And the said defendants say that the plea and answer of the said defendants is neither inartificially drawn nor uncertainly pleaded, nor does the said plea contain irrelevant and immaterial matter. Wherefore they persist in their plea, and pray that the said exception be overruled, with costs."

The Court sustained the exception, and the defendants put in an

Amended plea:—"And the said defendants, admitting that they are respectively editors, proprietors, and publishers of the *Zuid-Afrikaan*, and that the said defendants did edit, print, and publish the epitaph contained in the above paper, vol. 1, Friday, 18th June, 1830, No. 11. But the said defendants, denying that the said epitaph or alleged libel was composed or written, or caused to be composed or written, by them, or any one of them, aver that the said epitaph is no libel, nor does it contain any false, scandalous, malicious, or defamatory matter of or concerning the said plaintiff; and the said defendants therefore deny that the said plaintiff is injured in his good name, fame, or credit, by reason of the said alleged libel."

Replication:—"And the said plaintiff says that the said epitaph in the said plea mentioned, and which is the libellous matter in the said declaration complained of, is a libel, and does contain false, scandalous, malicious, and defamatory matter of and concerning the said plaintiff, and thereupon the said plaintiff joins issue with the said defendants."

Thereafter the case was tried, and the plaintiff proved, to the satisfaction of the Court, by several witnesses, that the alleged libel applied to the plaintiff, and closed his case.

The defendants proposed to call witnesses to prove that they had read the epitaph, and had not seen its application to the plaintiff.

The Court held that this evidence would be immaterial, and therefore refused to admit it.

The defendants called—

Bernardus Josephus van de Sandt—being asked: “Do you know under what circumstances the epitaph was brought into the printing office?”

Answered,—“I cannot give a direct answer, either one way or other, to this question. It is so long ago, and I did not give particular attention to it. I have occasionally assisted in the printing of the *Zuid-Afrikaan*. I was in the office the evening before No. 11 was printed. I know there was a paragraph rejected out of the proof, and the epitaph was substituted in its place. I myself put it in types at the request of the foreman.” Being asked if he knew under what circumstances the epitaph was inserted, the witness declined to answer the question, as his answer might tend to criminate himself.

Brand, counsel for the defendants, was then called on by the Court to state whether he was prepared to show that, by the law of the colony, a person was not liable to a criminal prosecution for publishing, or aiding or assisting in the publication of a libel, of the nature of the one in question, upon or against a private individual, and he having stated that he was not prepared so to do, and did not press to have the objection overruled, the witness was not pressed to answer the question.

On cross-examination, the Attorney-General, for the plaintiff, put a question, which the witness declined to answer for the same reason as before.

The Attorney-General proposed to show that the witness was not liable to a criminal prosecution for a libel like the present, on a private individual; but after some discussion, and before the Court expressed any opinion as to the witness' liability to a criminal prosecution, he declined pressing the question.

The defendants closed their case.

Judgment for the plaintiff, £75, with costs.

Horstock
v.
Boniface,
Breda, and
Neethling.

DE LIMA, APPELLANT, v. BRIDA, RESPONDENT.

[14th September, 1839.]

Resident Magistrate.—*Falseness of Record here proved in Appeal*
—*right of adjournment to hear further Evidence.*

Rule 20 of Magistrate's Court explained.

De Lima,
Appellant,
v.
Brida,
Respondent.

This was an appeal against a sentence of the Resident Magistrate of Cape Town.

The Court were of opinion that the proceedings in the Resident Magistrate's Court had been very irregular, in respect that the case on the first day of hearing had been adjourned, in order to give the plaintiff an opportunity of bringing further evidence, without any sufficient reason for granting such adjournment being stated on the record, contrary to the provisions of the rule No. 20.

The Court expressed an opinion that, where the record of an inferior Court is alleged to be false, such falsehood cannot be pleaded in an appeal against the judgment, when the record cannot be impeached; but that the party alleging such falsehood should previously proceed to obtain redress, by calling on the other party by motion on affidavit to show cause why the record should not be amended.

But in the case of *Moore v. Le Sueur*, 1st August, 1844, on review, an affidavit was received to prove the Magistrate's refusal to receive evidence tendered, which fact was not stated on record, no objection having been made thereto by the respondent, and the case was remitted to the Magistrate to receive the evidence. (*Vide Greig v. De Lima*, 19th November, 1840, p. 29.)

IN RE TILLEY.

CREDITORS OF TILLEY v. NISBET & DICKSON, q.q.
W. TILLEY.

[9th September, 1830.]

Witness,—*competent to prove Debt against his Insolvent Estate.*

In Re Tilley.
Creditors of
Tilley v.
Nisbet &
Dickson, q.q.
W. Tilley.

In this case the insolvent was called by the defendant, a creditor, to give evidence, to prove the validity of the debts on which that creditor claimed a preference on the estate of the insolvent.

The plaintiffs objected that the witness was incompetent, on the ground of interest.

The Court overruled the objection, and *held* that the insolvent was a competent witness for the one party by whom he was called. Ordinance No. 72, § 20, and Philips 2: pp. 333, 336.

In Re Tilley.
Creditors of
Tilley
v.
Nisbet &
Dickson, q.q.
W. Tilley.

✓ LOUISA AND PROTECTOR OF SLAVES v. VAN DEN BERG.

[10th September—11th October, 1830.]

Promise, made in favour of a third person, in how far binding.

"Turpis Causa," in promise made, when pleadable.

This was an action brought by the plaintiff, claiming that the defendant should be condemned to pay to her, or to the Protector on her behalf, such sum or sums of money as may be requisite or necessary to purchase and obtain her emancipation, together with that of her child Julia, on the ground that the defendant, in presence of several witnesses, and on the death-bed of his son, with whom the plaintiff had cohabited, and who was the father of the said child, did, at the request of his said son, in the most solemn manner, promise and agree to purchase the emancipation of the plaintiff and her children. Whereupon his son soon after expired.

Louisa and
Protector of
Slaves
v.
Van den Berg.

In his plea, the defendant, 1st, denied ever having made any promise or engagement to Louisa, or to any one on her behalf, to purchase the emancipation of herself and her child, Julia. 2dly. He maintained that, even although it should be proved that he had made such a promise, yet that a promise of this kind constitutes only an imperfect obligation, and not such an obligation as can entitle the plaintiff, or any person on her behalf, to compel the defendant by law to the fulfilment thereof. 3dly. And, even supposing it to be proved that any agreement was entered into by him, he maintained that the *consideration*, being and arising from a *turpis causa*, would release the defendant from all obligation to comply therewith.

After evidence had been led by both parties,

Joubert contended that the promise was completely proved to have been made by the defendant, and to have been made at the son's request, and in the hearing of the plaintiff, and it must therefore be held to have been accepted by the son and by the plaintiff; and maintained that a verbal promise was as binding as a written; and that a gratuitous promise made to A B for the benefit of C D, and accepted by both or either,

Louisa and
Protector of
Slaves
v.
Van den Berg.

constitutes a legal obligation, the performance of which the law will enforce. (*Vide* Voet 2: 13, §§ 12, 14, 22; Grotius Inleid., b. 3, part 1, § 48, 49.)

Brand, for the defendant, maintained that no promise had been proved to have been made, but admitted that, if a promise had been proved to have been made, and not objectionable *ob turpem causam*, that it imposed a legal obligation on the defendant, and could be enforced; and maintained that the promise, if made, was made *ob turpem causam*, and therefore null, or at least not legally binding, and quoted Van der Linden's Gewysdens, case 29; Groenewegen ad l. 5, ff. de *Donationibus* (lib. 39, tit. 5), and l. 2, Cod. de *Natural liberis* (lib. 5, tit. 27); Voet, lib. 25, tit. 7, § 3, and lib. 39, tit. 5, § 6; and Van der Linden, Instit., b. 1, c. 14, § 2, 3, p. 190, 191.

[*Cur. Adv. Vult.*]

11th October,
1830.

Postea.—The Court held that it was clearly proved that the defendant gratuitously, but at the request of his son, who was then on his death-bed, expressly promised to his son to procure the freedom of the plaintiff, who, up to the period of the son's illness, had been the son's concubine, and at the time of the promise was present in the room, and of the children, which the son had procreated by her, and that there is no evidence that the son, before his death, ever relinquished this promise, or discharged it in any way.

The Court held that, by the law of this colony, gratuitous promises may be legally proved by parole evidence.

That the promise made by the defendant was accepted both by his son and by the plaintiff.

That a gratuitous promise made to A for the benefit of B, accepted by A and B, is binding on the promiser, and that performance thereof, if refused, may be enforced by legal proceedings, if not in its nature illegal. Groenewegen ad § 13, Inst., lib. 3, tit. 20, et ad l. 10, l. 12 Cod. de *Transact.*, lib. 2, tit. 3; Voet 2: 14, 9.

The Court held that the objection made to the validity of this promise, on the alleged ground that it was granted *ob turpem causam*, is well founded, in so far as relates to the plaintiff herself, if the promise could be held to apply to her, and to have been made only with reference to her, because the promise made by the defendant at his son's request cannot infer a greater or more effectual obligation than would a promise made by the son himself to the plaintiff, and because the plaintiff could not, by law, have enforced performance of a promise of the nature of the one in question, made to her by the son, at a time when she was his concubine. (*Vide* Voet 25: 7, 3; 12: 5, 6; Groenewegen ad l. 5, ff. de *Donat.*, lib. 39, tit. 5; see the authorities in the English and Scotch law cited Bell, vol. 1, p. 232.)

The *Court held* that this objection, however, does not apply at all, in so far as the plaintiff's child, or the interest of that child, is concerned.

Louisa and
Protector of
Slaves

v.

Van den Berg.

That there is no reason to believe that the promise was made solely from favour to the plaintiff or on her sole account. On the contrary, it appeared to the Court that the deceased was anxious to provide for the freedom of his child, and as the freedom of so young a child while its mother continued a slave, might even have been injurious to the child, while unable to take care of or provide for itself, the deceased was desirous to procure the freedom of the mother for the sake of the child, and that to a promise of freedom made or obtained under such circumstances the objection of *turpis causa* cannot possibly apply. (*Vide* the Statutes of Holland and the decisions of the Privy Council in the case of Anderson's slave.)

On these grounds the Court gave judgment for the plaintiff, and authorised the Protector of Slaves forthwith to institute the proceedings prescribed by law to purchase the emancipation of the plaintiff and her child, and condemned the defendant to pay to the Protector the price which shall be fixed for such emancipation, together with the cost of that proceeding and of the present suit.

BRINK *v.* ESTERHUYZEN.

[14th September, 1830.]

Executor.—" *Plene Administravit,*"—*liability thereafter.*

This was an action against the executor of the widow of a co-surety in a bond, the principal debtor and the other co-surety being insolvent, for the whole debt.

Brink
v.
Esterhuyzen.

In defence it was objected, 1st, that the widow was not sole heiress, but that she and her children were jointly instituted heirs, and therefore she could not be sued *in solidum*, but only *pro rata* with her children.

2dly. That the defendant, as executrix, had no funds, having liquidated and distributed the estate more than twelve years ago.

Replied :—The claimant was then in England, and had no knowledge of this distribution, and could not be affected by it, notwithstanding the executor had given notice in the *Gazette* that all those having claims against the estate should present them, because that notice was not given in the usual form by a summons to creditors, issued by the Supreme Court.

The Court dismissed the claim in respect of the second objection, stated by the defendant.

WALKER, APPELLANT, v. CLERK OF PEACE OF ALBANY.

[14th September, 1830.]

Ordinance No. 23.—Its application.

Walker,
Appellant,
v.
Clerk of Peace
of Albany.

The defendant had been found guilty, and fined £50, under the 9th clause of Ordinance No. 23.

The defendant appealed, and pleaded that he had obtained permission to pass the boundaries and to trade with the Kafirs, by certain letters of the Secretary to Government, prior to the passing of the Ordinance No. 23, and therefore that he was not required by law to take out any licence, or to obtain any passport, as directed by the provisions of the Ordinance No. 23.

Judgment.—Find that there is no sufficient evidence that the appellant passed the boundaries of the colony subsequently to the 11th September, 1826, without having obtained permission so to do in the form and manner required by the provisions of the Ordinance No. 23; and that, after so passing the boundaries of this colony, he actually engaged in traffic with the Kafirs; therefore sustain the appeal, reverse the sentence complained of, and find no costs due to either party.

NISBET & DICKSON v. RICHARDSON.

[16th September, 1830.]

Appeal not competent against a decree of Civil Imprisonment, in execution of a Judgment not appealed against.

Civil Imprisonment, granted, notwithstanding Petition for leave to such Appeal.

Nisbet &
Dickson
v.
Richardson.

This was a motion for a rule on the defendant, to show cause why a writ of execution should not issue on a decree of civil imprisonment, granted by the Court on the 14th instant, for payment of the balance due to the plaintiffs, according to the scheme of liquidation of the insolvent estate of the defendant, which had been finally approved of on the 13th instant.

The defendant had lodged a petition for leave to appeal against the decree of civil imprisonment, and had given notice thereof to the plaintiffs.

The Court held that it was not competent for the defendant, in this case, to appeal against the decree for civil imprisonment, and therefore made the rule absolute, with costs; leaving it to the defendant, if so advised, to appeal against the judgment by which the Court approved of the liquidation account

BUCK *v.* EKSTEEN, J. P. SON.

[21st September, 1830.]

Misnomer in Summons,—whether fatal, if identity of Defendant is sufficiently established;—nullity of Sentence dependent thereon.

The Court refused to stay execution of a writ against the property of H. O. Eksteen, J. P. son, moved for, on the ground that the summons on which the judgment was given by default was against H. O. Eksteen, H. O. son, because the identity of the defendant was sufficiently established by the reference in the summons to his dwelling place, and therefore, in the circumstances of this case, description *H. O. son* or *J. P. son* was surplusage, and a mistake with regard to it was of no consequence.

It was admitted that the summons and all the notices had been served on H. O. Eksteen, J. P. son, the person truly intended in the summons, and who was actually the debtor of the plaintiff.

Motion refused, with costs.

Buck
v.
Eksteen, J. P. s.

PROTECTOR OF SLAVES *v.* THEUNISSEN'S TRUSTEES.

[23d September, 1830.]

1. "*Legatum Liberationis*" of a Slave annulled by insolvency of Testator at his death.
2. Witness, if entitled to Commission or Percentage, is interested, and is rejected.

By his will, dated 9th March, 1827, Theunissen directed his executors to emancipate after his death, certain of his slaves, therein named.

It was admitted that the testator was solvent at the date of the will.

At the trial it was proved that his estate was insolvent at the time of his death.

Cloete, for the slaves, maintained that, notwithstanding the insolvency of the estate at the time of the testator's death, they were entitled to their emancipation, and that *legata liberationis* were, by the *civil law*, placed on a different footing from *legata pecuniæ*, or of other property, and quoted § 2 and 3 Inst., *Quibus ex caus. lib. 1, tit. 6, et Instit. de leg. Fusia Can. lib. 1, tit. 7; l. 1, Cod. Qui manum. non possunt.*, lib. 1, tit. 11; Huber Præl. ad Instit. lib. 1, tit. 6.

Protector of
Slaves
v.
Theunissen's
Trustees.

Protector of
Slaves
v.
Theunissen's
Trustees. Joubert, *contra*, quoted l. 5, 10, ff. *Qui et a quib. manum.* lib. 40, tit. 9, et Voet *eodem titulo*.

The Court held that, even by the Roman law, which had been quoted, the plaintiffs were not entitled to claim their freedom, and gave judgment for the defendants.

As to how far the Roman law on the subject of slaves had ever been in force in this colony, *vide* Groenewegen *passim*, and Voet 1: 5, 3.

2. In the course of the trial, it was proposed to call as a witness, on the part of the defendant, Watermeyer, the trustee of Theunissen's estate, and who, as such, was the nominal defendant; but it being shown that he was to be paid a commission, or percentage, on the amount of the assets of the estate, he was rejected as having an interest in the cause.

STORM v. BRED A AND DE LIMA.

[28th September, 1830.]

Sequestration—under old Law—effect of, on future acquisition of Debtor.

Liquidation Account, in terms of § 50 of Sequestrator's Instructions—effect of.

Printing Press and Materials not exempt from execution, as being Tools of Trade.

Storm
v.
Breda and
De Lima.

The plaintiff had caused a certain printing press and materials, belonging to De Lima, in the possession of Breda, to be attached in the hands of Breda, in satisfaction of a debt, which was set forth as being due by De Lima to the plaintiff in the liquidation account of the insolvent estate of De Lima, which was final under § 50 of the Sequestrator's Instructions, by which nothing was awarded to the plaintiff in respect of his debt.

Breda and De Lima were this day summoned to show cause why the attachment should not be confirmed, and the printing materials delivered over to the plaintiff.

Breda did not appear.

Cloete, for De Lima, opposed the application, on the ground, 1st, that the property was of such a nature, being the defendant's tools of trade, that it could not be attached or taken in execution, and quoted Van Leeuwen, Cens. For., pt. 2, lib. 1, tit. 15, § 28 et 29.

2dly. He maintained that, admitting as he did, that the debt claimed by the plaintiff was due to him, and that the property was of such a nature as that it could be attached or taken in

execution, it was not competent for the plaintiff to claim that the property attached should be applied exclusively to the payment of his debt, but that the property should be delivered over to the Sequestrator to be distributed among all the creditors of the defendant, and quoted Voet 42: 1, § 38.

Storm
v.
Breda and
De Lima.

The Court were unanimously of *opinion* that the liquidation account of the Sequestrator, prepared under § 50 of the Sequestrator's Instructions, was, in its effects, equivalent to a liquidation account confirmed by the Court, consequently, had the effect of a decree in favour of the plaintiff for the debt for which he had been ranked; and as by this liquidation account nothing had been awarded to him in respect of this debt, that this decree entitled the plaintiff to attach and take in execution, for his own behoof, any property of his debtor by law attachable and executable, and acquired by the debtor subsequent to the date of the sequestration.

That a printing press and printing materials, of the nature of those in question, were not exempt from the process of execution, and had consequently been lawfully attached by the plaintiff in satisfaction of his debt, and that he was now entitled to the judgment of the Court, declaring the property executable for his debt, and ordering it to be sold.

Judgment was given accordingly, with costs.

IN RE BLANCKENBERG.

WATERMEYER v. HECKROODT AND KUUHL.

[28th September—9th December, 1830.]

1. *Insolvent Estate*.—Ordinance 64—objection to ranking of Debt how to be made.
2. *Hypothec*—special and general—general not lost by discharge of special;—right of Cession of second Hypothecation.

1. Watermeyer had obtained a rule *nisi* on the trustees of Blanckenberg and his creditors, to show cause why the first preference on that estate should not be awarded to him.

In Re
Blanckenberg.
Watermeyer
v.
Heckroodt
and Kuuhl.

Cloete, for the defendant, showed cause, and was proceeding to state objections to the validity of the plaintiff's claim against the estate, on which it had been ranked by the Master as a concurrent claim, against which ranking no objection had hitherto been made. The Court held it was incompetent for him to do so in this way, but no motion allowed him, under the 84th section of Ordinance No. 64, now to state his objection to the validity of said debt, and granted him a rule *nisi*

In Re
Blanckenberg.
Watermeyer
v.
Heckroodt
and Kuuhl.

on the plaintiff to show cause why his alleged debt should not be expunged from the debts against the estate, (this rule was afterwards by consent discharged, with costs,) and enlarged the plaintiff's rule, and found him entitled to the costs of the day.

9th Dec. 1830.

Postea.—Joubert, for Watermeyer, moved to make absolute the rule which he had obtained, calling on the defendants to show cause why the scheme of distribution of the insolvent estate of Blanckenberg should not be amended, by awarding the first preference on said estate to him, on his claim in respect of the bond in his favour, dated 9th May, 1806, containing a clause of general hypothecation, and duly registered, notwithstanding it also contained a special hypothecation of immoveable property, instead of to the defendants, in respect of a bond posterior in date (31st October, 1823) to Watermeyer, in favour of Lord C. Somerset, and now ceded to them.

Cloete maintained, 1st, that Watermeyer, having allowed his special mortgage to be lost, has thereby lost the benefit of his general hypothecation, in *concurso creditorum*, even although the debt of the adverse creditors was not contracted until after the special hypothec had been lost or discharged.

He alleged that it was proved by Watermeyer's bond that the estate of the *Grove* had been specially hypothecated to him, and that in 1818 he had suffered the *Grove* to be sold by his debtor, and transferred to a third party, without taking any steps to prevent this, or recover his debt or any part of it, out of that estate, whereby he contended that the special hypothec had been lost and rendered inefficient. He quoted Van der Linden, Inst., b. 1, c. 12, sect. 6, p. 181; Voet 20: 1, 15; Dutch Consult., vol. 1, cons. 266, and vol. 3, cons. 112; Van der Sande Decis., lib. 3, tit. 12, defin. 26, p. 386; Wassenaar Pract. Jud., c. 22, num. 67.

2. On these authorities, he maintained that, if the special hypothec was not yet lost, the plaintiff was bound to excuss the special hypothec before he claimed on the general estate. He quoted also Neostadius Decis. Supr. Cur. Dec. 41.

Joubert argued, 1st, that in the opinion of his client he had lost his special hypothec by the transfer of the *Grove* in the land register to a third party, notwithstanding that on Blanckenberg's title in the register, his (Watermeyer's) hypothec stood still uncanceled, and notwithstanding Voet 20: 6, 6.

2dly. He maintained that, even if the special hypothec did still subsist, or it was uncertain whether it still subsisted, he was entitled to claim on the general estate, provided he offered the cession of the special hypothec, and quoted *l. 2, Cod. de pignor.* lib. 8, tit. 14, and Consultation 266, supr.

The *Court* were unanimously of opinion that Watermeyer, by having discharged or suffering his special hypothec to be lost in 1818, supposing that what took place amounted to a discharge, or occasioned a loss of his special hypothec, before a *concursum creditorum* took place, and more especially as the general hypothecation in respect of which the defendants now claimed was not constituted till 1823, was not barred thereby from now obtaining a preference, in respect of his prior general hypothec, and therefore that the scheme of distribution should be amended, and preference given in it to Watermeyer before the defendants.

In Re
Blanckenberg.
Watermeyer
v.
Heckroodt
and Knuhl.

But in respect that the defendants alleged that the special hypothec still subsisted, and might be made effectual, that Watermeyer should assign over to the defendants his right of action, in virtue of his special hypothec *pro tanto* of the sum, for which preference was awarded to him; and with this finding made the rule absolute, with costs.

IN RE RUSSOUW.

SEQUESTRATOR, FOR ESTATE OF TYRHOLM, v. THOMSON
AND GEYER.

[28th September, 1830.]

*Hypothec—general,—prior in date, preferent to posterior Special
on Moveables without delivery.*

The plaintiff had obtained a rule *nisi* to show cause why the amended scheme of liquidation, framed by Russouw's trustees, shall not be referred back to the trustees, for the purpose of reamending the same, and why preference should not be awarded therein to the claim of the plaintiff, administering the estate of Tyrholm.

In Re
Russouw.
Sequestrator,
for estate of
Tyrholm,
v.
Thomson
and Geyer.

Tyrholm's estate claimed, in respect of a notarial bond, dated 7th July, 1823, being the first general mortgage over Russouw's estate.

The adverse creditors were F. Geyer, who claimed preference over the proceeds of certain moveables, in virtue of a notarial bond, of a date subsequent to Tyrholm's, but specially hypothecating those moveables, but of which Geyer never obtained possession before Russouw's sequestration, and Thomson, who claimed on a similar bond, under similar circumstances.

Cloete, for Geyer, maintained that a special hypothec of moveables, constituted by a public instrument, duly registered, was entitled to a preference over all claims, and consequently

In Re
Russouw.
Sequestrator,
for estate of
Tyrholm,
v.
Thomson
and Geyer.

over a prior general hypothec, provided the moveables hypothecated are in the possession of the debtor when the competition arises; and quoted Voet 20: 1, §§ 12, 14; Van Leeuwen's Comment., b. 4, c. 13, § 19, p. 365; Grotius Int. 2: 48, §§ 25, 26, 27, 28; Van Leeuwen, Cens. For., 4: 7, § 4; Wassenaar Pract. Notar., c. 12, § 30; Van der Keessel Thes. 210, 427, 432, 450.

Joubert maintained the contrary, and quoted Van der Linden's Observ. on Grotius Int., vol. 3, obs. 58.

The Court unanimously held that a prior general hypothec was preferent to a subsequent special hypothec of moveables, not followed with possession, and made the rule absolute, with costs.

[The same was found in *re* Dusing,—Neethling v. Van der Byl, 11th January, 1831.]

IN RE DUSING.

MEYER v. CREDITORS OF DUSING.

[29th Sept.—11th Oct., 1830.]

"In Fraudem Creditorum," a Bond passed forty-three days before Insolvency, not under Ordinance No. 64.

Guardians,—appointment for Minor Heirs does not include Minor Legatees.

In Re Dusing.
Meyer
v.
Creditors of
Dusing.

The plaintiff had obtained a rule *nisi* against the defendants to show cause why the scheme of distribution in this estate shall not be amended, and preference awarded to the plaintiff.

Cloete, in support of the rule, maintained that Meyer was preferable on the proceeds of four slaves, amounting to about Rds. 2000, in respect of a notarial bond, dated 7th July, 1829, registered 13th July, in both the colonial and slave registers, whereby Dusing declared to bind specially, for security of such sum of Rds. 2000, as Meyer had from time to time become security for or granted acceptances, or for which he may yet become security or grant acceptances, in favour of said G. H. Meyer, his four slaves, in order that therefrom may be recovered all the loss and injury which the said Meyer may eventually sustain thereby; and in respect that Meyer had proved a debt against Dusing's estate to the amount of Rds. 14,200, being more than the amount of the proceeds of the slaves. This debt arose, *inter alia*, from Meyer having, as surety, paid the amount of a bond for Rds. 6000, dated 5th July, 1827, passed by Dusing in favour of Van Willigh, and by him ceded to Villiers.

De Wet, for the guardian of the minor legatees of the late Van der Byl, and as such creditors on the estate, objected to the validity of the above bond.

In Re Dusing.
Meyer
v.
Creditors of
Dusing.

1st. That it was granted, or at least registered, only forty-three days before the surrender of Dusing's estate as insolvent, which took place on the 25th August, and consequently was rendered null by the provisions of the Ordinance No. 64, as being within sixty days of the surrender.

The Court stopped him, and held that the Ordinance did not extend to any securities or preferences created prior to the day when the Ordinance took effect.

2dly. De Wet next maintained that the bond was null, as having been granted when Dusing was actually insolvent, and when his insolvency was known to Meyer who was intimately acquainted with all Dusing's affairs, and was indeed his *factotum*, and quoted Voet 42: 8, 3, and maintained that Voet 42: 8, 18, was not adverse, because he must be held to be speaking of the case, where the creditor knew of his debtor's insolvency, and not where both the debtor and creditor knew of the insolvency.

3dly. He maintained that, even supposing the bond valid in law, still that it could not create a preference on the proceeds of the slaves preferable to the preference claimed by the minor legatees of Van der Byl, in consequence of Dusing having, as was alleged, been the guardian of those minor legatees; and to show that Dusing had been the minors' guardian he quoted Van der Byl's will, whereby he bequeathed to the children of his sister Betje a sum of 6000 guilders, to Thomas D. Snibbe the sum of 6000 guilders, to Rachel van der Byl the sum of 6000 guilders, to J. Ungerer 5200 guilders, to all the children for whom the testator stands as god-father, one by one a head, Rds. 200. "The testator further did prelegate or bequeath to D. van der Byl, jun., the slave Candasa, to M. E. van der Byl the slave Mariana; and now, proceeding to the election of heirs, the testator declared to nominate and institute, as his sole and universal heirs, the aforesaid D. van der Byl and M. E. van der Byl, in equal shares in all the property to be left behind by the testator, or, in the event of the predecease of one or more of them, their lawful descendants, by representation. As executors of this last will, administrators, trustees of the estate, and guardians over the minor heirs, the testator did nominate and appoint Messrs. Dusing and Pohl." And he maintained, on the authority of Avernianus, lib. 5, c. 10, § 7, that heirs and legatees were sometimes used as convertible terms,—that it was the intention of the testator to appoint his executors guardians to the minor legatees as well as to the minor heirs,—that Dusing had understood the will in this sense, and had accordingly

In Re Dusing. continued to administer the legacies; and if, as he had con-
Meyer tended, Dusing was the guardian of the minor legatees, then
v. consequently the legatees had a preferent legal hypothec over
Creditors of Dusing. the whole estate of Dusing, their guardian.

Cloete, in reply to the second point, quoted Voet 42: 8, 18; Grotius Inl., 2: 5, § 4, and the notes therein; Bellum Juridicum, cas. 86, and therefore, although admitting the insolvency of Dusing, and the knowledge of that insolvency by Meyer, he contended that the bond was valid; and on the third point denied that it had been established that Dusing was the guardian of the legatees.

[*Cur. Adv. Vult.*]

11th Oct. 1830. *Postea*.—Judgment for the plaintiff, with costs.

The Court held that the bond was not *in fraudem creditorum*, and that Dusing was not the guardian of the minor legatees; consequently, that they had no legal hypothec for their legacies over Dusing's estate. (*Vide infra* Neethling v. Blommestein's Trustees, 27th February, 1844.)

NISBET & DICKSON, q.q. REEVES, v. COOKE.

[29th September, 1830.]

Exception of Non-qualification,—overruled on the provision not pleadable again in the principal Case.

(*Vide supra inter eosdem*, 1st September, 1830.)

Nisbet &
Dickson,
q.q. Reeves,
v.
Cooke.

Joubert moved for a rule against the defendant, to show cause why the exception of non-qualification shall not be expunged from the record as having been overruled and disposed of on the 1st instant, and why the defendant should not be ordered forthwith to plead to the plaintiff's claim on the merits, or remain undefended on the record, and the plaintiffs allowed to proceed by default.

On the 1st, when the provisional claim had been made, the defendant had pleaded non-qualification, but had afterwards, on the Court (after hearing the plaintiff) being about to pronounce judgment against him, withdrawn the exception, and opposed the provisional claim on the merits. The provisional claim was refused.

The plaintiff had since filed his declaration, and on the 23d instant, when the defendant was bound to plead, answer, or except, he, instead of pleading, filed an exception of non-qualification.

The Court considered that the exception had been overruled by the Court on the 1st, and that the defendant was not entitled to take the exception again in the principal case, and therefore ordered the exception to be withdrawn, and the defendant to file his plea before 12 o'clock to-morrow, to be held as if filed on the 23d instant, with costs.

Nisbet &
Dickson,
q.q. Reeves,
v.
Cooke.

IN RE LOND.

BLANCKENBERG v. THE GUARDIANS OF LOND.

[29th Sept.,—11th Oct., 1830.]

Hypothec,—"Pignus prætorium," prior, preferent before posterior general Hypothec.

Minors not entitled to preference on Bonds in their favour, granted by a person, not their Guardian.

The plaintiff in this case, as holder of a bond for Rds. 3275, passed by the insolvent Lond, obtained a sentence against him by the late Court, and lodged the same with the Sequestrator for execution, on the 7th March, 1826; and on the 17th March, 1826, Lond gave up to the Sequestrator, *inter alia*, a slave named Carolus, in security of the amount of the said sentence.

In Re Lond.
Blanckenberg
v.
The Guardians
of Lond.

The plaintiff from time to time received partial payments from Lond, which reduced his claim to Rds. 483 5 sk. 4 st.

On the 23d January, 1818, Lond passed a bond for 32,000 guilders to the guardians of his children, for a debt due to them as the heirs of their grandfather, and in security thereof hypothecated certain slaves. The bond was duly registered both in the colonial debt register and in the slave register.

Thereafter, by the consent of the guardians, Lond, by a deed, substituted a slave, Piet, in lieu of one of the slaves originally hypothecated by the said bond; and on the 24th July, 1826, with the consent of the guardians, Lond, by a deed, substituted the slave Carolus, whom he had previously given up to the Sequestrator, in security of the plaintiff's sentence, in room of Piet.

The hypothecations of Piet and Carolus were duly entered in the slave register, that of Carolus on the 21st May, 1827. But no entry appears to have been made in the colonial debt register of either of the deeds by which Piet and Carolus were respectively hypothecated, or of the fact that such substitution had taken place.

Thereafter, at the instance of the plaintiff, the Sequestrator caused an advertisement to be inserted in the *Gazette* of the

In Re Lond. 20th November, 1827, announcing the sale of the slave boy
Blanckenberg Carolus, in satisfaction of the said sentence. But the wife of
The Guardians Lond having died on the 15th October, 1827, the Orphan
of Lond. Chamber entered on the administration of the joint estate of
 her and her husband, *ab intestato*, in consequence of which
 the sale of Carolus by the Sequestrator did not take place.
 Afterwards the Orphan Chamber sold Carolus for the sum of
 Rds. 500. The Orphan Chamber having subsequently found
 that the joint estate was insolvent surrendered the same.

The defendants, being the guardians of Lond's children,
 were appointed sole trustees of the insolvent estate, and in
 their distribution of the assets among the creditors, they
 awarded the proceeds of Carolus to those children, on the
 ground,—

1st. That the bond granted to them by Lond, being granted
 in favour of minors, constituted a legal hypothec over his
 estate, preferable to all others.

2ndly. That the special hypothecation of Carolus in favour
 of the children, constituted on the 24th July, 1826, is entitled
 to a preference over the *pignus prætorium*, which the plaintiff
 obtained over this slave on the 17th March, 1826.

The plaintiff denied both those propositions.

11th Oct. 1830. The Court held, 1st, that the minors had no legal hypothec
 over Lond's estate, he not having been their guardian. (Same
 found same day in *Brink v. the Guardians of Lond.*)

2dly. That a *pignus prætorium* had been established in the
 plaintiff's favour over the slave Carolus previously to the con-
 stitution of the special hypothec over Carolus in favour of the
 guardians of the minor heirs.

3dly. That the *pignus prætorium* had not in any way been
 discharged or destroyed prior to the time when, in consequence
 of the death of Lond's wife, their joint estate, including
 Carolus, was taken under the administration of the Orphan
 Chamber.

The Court held that this being the case, it was not neces-
 sary to determine whether, the original bond in favour of the
 guardians having been duly registered, and the hypothecation
 of Carolus in room of one of the slaves originally hypothecated
 by said bond having been duly registered in the slave registry,
 the non-registration of this deed, by which Carolus was sub-
 stituted in place of the other slave, in the colonial register, had
 the effect of annulling the hypothecation of Carolus in a ques-
 tion with third parties.

The Court expressed an opinion that the slave registry law
 was imperfect, in so far as it did not require that attachments
 of slaves by the Sequestrator should be registered in the slave
 registry.

Judgment for the plaintiff, with costs.

WITHAM, q.q. LA FORET v. NOURSE.

[30th September, 1830.]

Sequestration under Old Law.—Where Partnership Estate sequestrated, the Rehabilitation of a Partner, whose private Estate had not been surrendered, not effectual against his private Creditor.

Creditor absent when Rehabilitation granted, may afterwards object to its validity any matter, which, if duly summoned, he might have objected before granted.

This was an action for the amount of three bills, first, for £353 8s. 6d., secondly, for £223 19s. 8d., and thirdly, for £219 18s. 5d., all drawn in England on Messrs. H. Nourse & Co., wine merchants, Wigmore-street, and accepted by the defendant in England, but payment of which was not made when due, the defendant then being in England, with interest thereon, amounting in all to £1300 odds.

Witham,
q.q. La Foret,
v.
Nourse.

The defence was, that, admitting the original debt, the plaintiff ought not to have or maintain his action against the defendant, because he, the said defendant, was, by a certain act of rehabilitation, duly published in the *Government Gazette* of the colony, dated 30th September, 1820, now remaining in the office of the registry of this Court, duly and according to law discharged from the said debt. Whereupon he prayed that the claim of the plaintiff may be dismissed, with costs.

Against this defence it was contended that the act of rehabilitation could not avail the defendant against the present claim, because the debt now claimed was due by Nourse individually, and because his individual estate had never been surrendered to the Sequestrator, or under the control or administration of the Court; consequently, the Court had no power, by any act of rehabilitation or otherwise, to discharge the defendant individually from any debts due by him as an individual.

The act of rehabilitation contained the usual clause, "with this restriction, however, that the right of creditors abroad, who have not been, or could not be heard as aforesaid, shall not be prejudiced by these presents."

The Court were of opinion, 1st, that the debt now claimed was a debt due by the defendant individually, and not due by the firm either of Nourse & Christian, or Nourse, Christian, & Company.

2dly. That it had been proved that the defendant's separate estate had never been surrendered, and that the only estates which were surrendered, were the estate of Nourse & Christian, and Nourse, Christian & Co., and the separate estate of Christian.

Witham,
q.q. La Foret
v.
Nourse.

3dly. That the late Court had therefore no power to rehabilitate the defendant against debts due by him individually.

4thly. That the plaintiff, who had not been summoned to oppose the rehabilitation, and who had then been absent from the colony, was entitled now to make any objection to the act, which would have been competent to him to have stated before it was passed.

5thly. That the plaintiff having shown that the separate estate of the defendant, notwithstanding the allegation in the act that it had been surrendered, had not been surrendered, was now entitled to object that the act of rehabilitation was null as against the individual creditors, and therefore to maintain the present action, notwithstanding the said act of rehabilitation.

Judgment for the plaintiff, with costs, and interest at 5 per cent. from the date of the protests, as claimed. (*Vide infra* Theunissen v. Volkwyn, 1st December, 1832; and Zeyler v. Muller, 12th October, 1837.)

LOEDOLFF v. THE PRESENT ORPHAN CHAMBER AND
THE SURVIVING MEMBERS OF THE FORMER
ORPHAN CHAMBER.

[12th October, 1830.]

Orphan Chamber,—Liability of Members and Secretary of, for loss occasioned by negligence, under Instructions 70, 71, 72.

New Board not liable for negligence of previous Board.

Loedolff
v.
The Orphan
Chamber.

The facts of this case were as follows:—On the 20th September, 1822, A. M. Horak passed a bond for £150, with interest from that date, in favour of the widow Loedolff, and in security thereof, specially mortgaged two slaves, Spatie and February, in which J. W. Horak, Niekerk, Van Dyk, and Seyffert bound themselves as sureties.

On the 2d September, 1823, J. W. Horak became insolvent, and no claim was made on his estate, in respect of this bond by the widow. It was admitted that, even if a claim had been made, nothing could have been recovered from this estate.

A year's interest became due on 20th September, 1823, when the widow Loedolff died, leaving a minor daughter, now the wife of the plaintiff. On the 6th November, 1823, the Orphan Chamber entered upon the administration of the estate of the widow, as the testamentary executors of the widow, and guardians of the minor.

On the 2d December, 1824, the principal debtor, A. M. Horak, surrendered his estate as insolvent.

Loedolff
v.
The Orphan
Chamber.

The Orphan Chamber made no claim in respect of this bond on Horak's estate, and suffered the estate to be wound up and distributed among the creditors in 1825, without any thing being awarded in respect of the said bond.

It was admitted that, if a claim had been duly entered, Rds. 594, the net proceeds of the two slaves hypothecated in the bond, would have been awarded in respect of the bond, but that no more than this could have been received from Horak's estate.

The Orphan Chamber had taken no steps whatever, either against the debtor or any of the sureties, for securing or recovering principal or interest due on this bond prior to May, 1826, when the plaintiff received the amount of his wife's inheritance from the Orphan Chamber.

The Orphan Chamber then insisted that the plaintiff should accept this bond as part of his inheritance, which he objected to do, and thereafter a correspondence ensued between the plaintiff and the secretary of the Orphan Chamber.

On the 5th June, 1825, the plaintiff wrote to the board, stating that after having examined the above bond, which had been delivered to him for that purpose, he returned the bond, stating his reasons for refusing to receive it at its full value, and, *inter alia*, his fear that the sureties, if sued, would object to the want of due excussion of the estate of the principal debtor.

To this letter the secretary of the Chamber replied on the 14th June, that "the board of Orphan Masters having had under their consideration the letter which you addressed to them on the 5th instant, I am directed to return to you the enclosed bond, and to acquaint you in reply, that you should apply to the gentlemen who became sureties for the amount of the bond of Rds. 2000, due by A. M. Horak to your wife's estate, and who, in the first instance, ought to have provided that due notice was given of the bond in question to the Sequestrator's office."

On the 5th August, 1826, the plaintiff wrote to the Orphan Board as follows:—"I have therefore the honour to state to your reverences, with all respect, my readiness to accept the bond in question. I will also cause the sureties to be immediately called upon for the money, and will not fail, if any one of the sureties should be unwilling to pay (without deduction of that which has been assigned to the holder of the second mortgage, viz., the proceeds of the two hypothecated slaves), to give your reverences timely notice thereof, with reservation in that case of such action, as in time being I may have for loss and damage, whether it be against your reverend

Loedolf
v.
The Orphan
Chamber.

board, or against a third person, declaring, as I do expressly, that by the acceptance of the bond aforesaid, I will by no means be considered as acknowledging the stability of the reasons, for which I am referred, in the letter of your Secretary, dated 14th June last, to the sureties, or as giving up such right as I may have for loss and damage, upon whomsoever it may be, whether at present or in time to come."

On the 23d August, 1826, the Secretary of the Orphan Chamber wrote to the plaintiff, acknowledging receipt of the above letter of the 5th August, and informing him, that "I am now directed to acquaint you in reply, that, as the bond in question was originally the property of the estate of your late mother-in-law, you will understand that the Board do not hold themselves responsible for any loss that may result to you."

Here the correspondence terminated, and the bond, on which the Orphan Chamber had indorsed a cession of it in favour of the plaintiff, with a declaration "that the amount of the aforesaid bond having been settled in account," remained in possession of the plaintiff, who thereafter instituted proceedings against Niekerk, one of the sureties, and recovered sentence against him, on the 7th December, 1826, and lodged it with the Sequestrator for execution. Niekerk became insolvent in 1827 and in respect of the said sentence only Rds. 194 was awarded to the plaintiff.

In May, 1827, Seyffert, the surety, surrendered his estate as insolvent, before any proceedings had been taken against him on the bond, and nothing was awarded, although the plaintiff in 1829 lodged a claim on the estate, or would have been awarded, although he had claimed immediately after the surrender of the estate.

The plaintiff instituted proceedings against the fourth security, Van Dyk, and recovered sentence against him on the 13th September, 1827, and lodged it for execution with the Sequestrator, who attached seven slaves, but nothing more was done until the abolition of the Sequestrator's office. On the 16th April, 1828, he obtained a writ in execution of the said sentence, and lodged it with the Sheriff, who, in May, attached the same seven slaves; but in consequence of a claim made by the wife of Van Dyk, that these slaves, although registered in Van Dyk's name, were her property, the Sheriff refused to proceed with the execution, unless he received an indemnity from the plaintiff.

The plaintiff did nothing until 28th January, 1829, when he addressed a letter to the new Board of Orphan Masters, in which, after narrating what had been done against Van Dyk, he stated that he did not consider himself obliged to indemnify the Sheriff, or proceed further in prosecution of the claim against Van Dyk, for the benefit of the board, called on the

board to do so, and stated his intention to sue the board for the amount of the bond; to which he received a reply, dated 18th March, 1829, from the secretary, informing him that "*the board do not find sufficient grounds for deviating from the resolution of the late board, as communicated to you on the 12th June and 23d August, 1826.*"

Loedolff
v.
The Orphan
Chamber.

Thereafter, Loedolff brought an action against the president and directors of the existing Orphan Chamber, for the amount of the bond, under the reduction of Rds. 194 5sk., which he had recovered from the estate of Van Niekerk with the interest on the bond since 20th September, 1822, on the ground of the neglect and maladministration of the Orphan Chamber, under the administration of which the estate of his wife had been during her minority.

In defence against this claim, the board, *inter alia*, pleaded that they were not liable, because "*all the circumstances complained of happened and took place during the administration of the late president and directors of the Orphan Chamber, all of whom, except Vincent Adriaan Bergh, Esq., are still living, and accountable, in their persons and property, for the neglect and maladministration complained of.*"

The defendants also denied that "*they or any of them individually, ever became administrators of the estate of Hester Pool, widow, or guardians of her only heiress, in manner as in the said declaration is mentioned.*" And they averred that "*the guardianship of the Orphan Chamber, as therein referred to, ceased and was at an end some considerable time before the appointment of these defendants, as president and members, or directors of the newly modelled board.*"

After hearing parties, on the 9th February, 1830, it was ordered by the Court, that the plaintiff in this cause be allowed to summon the late president and members of the above board as defendants, in addition to the present members.

Thereafter, Loedolff summoned the late president, members, and secretary of the former Orphan Chamber, and made the same claim against them, which he had formerly done against the president and directors of the existing Chamber.

In their plea, the defendants stated the following defences:

Defendants' plea or answer,—"*All the defendants (excepting the secretary) say, that even if all the facts, alleged by the plaintiff in his said declaration, were true, proved, or admitted, yet they are not liable to a judgment in the manner and form as prayed against them by the plaintiff in this suit, because they say that their liabilities are fixed and limited by the instructions under which they have accepted of, and entered upon, the duties of their respective public offices, under the appointment of the Colonial Government of this colony; and in support of this plea, they, the said five first-*

Lodolf
v.
The Orphan
Chamber.

mentioned defendants, more particularly rely on the 70th and 71st articles of their said instructions.*

"Wherefore they, the five first-mentioned defendants, pray the Court to grant them absolution from this instance, with costs.

"And as a further plea for all the defendants (including the secretary), they deny that the said bond was received by the said plaintiff *under "protest,"* as has been untruly alleged in the said declaration, but they say that the said bond was received by the said plaintiff, after an agreement, and under certain conditions, specified and set forth in two letters, the one addressed by the plaintiff to the defendants, and the other addressed by the defendants, in reply to the plaintiff, bearing date the 5th and 23d August, respectively.

"And the said defendants aver that if it should be found that nothing, or only a part, can be recovered of the amount of the said bond, from the several debtors therein named, it is owing to the neglect or maladministration of the plaintiff himself, after he became the holder of said bond, under the circumstances and stipulations before mentioned, for they say, that, admitting all that is stated to have taken place, with regard to said bond, before the same was delivered up to and received by the said plaintiff, in the month of August, 1826, they deny that they, or any one of them, are, or is thereby rendered liable to the present action; and they further deny that he, the plaintiff, did and performed, after that date, what he was bound to do and to perform, according to the agreement entered into, and they aver that the plaintiff, by failing to comply with the conditions and duties imposed by agreement on himself, and by his neglect and maladministration in the matter aforesaid, has released the defendants from all further responsibility."

INSTRUCTIONS.—Art. 70.—"When any one might suffer damage through neglect, error, or otherwise, of the secretary, and the Orphan Masters have observed the said monthly precaution, nobody shall be responsible than the *secretary* and *sureties*, unless the said orders might not have been attended to by Orphan Masters or their Commissioners, in which case those who might have been in default thereof shall be bound

* After judgment had been given against these defendants, they brought an action against the secretary, to relieve them from the consequences of that judgment, on the ground that all the acts of omission and maladministration, in respect of which said judgment was given, had been committed by the defendant, the secretary, or through his fault or negligence, and that by the constitution of his office, he was liable to the plaintiffs to make good all loss and damage thereby incurred. (*Vide* Instructions for Orphan Chamber, articles 69-73.)

The Court absolved the defendant from the instance, with costs, 27th December, 1832.

to pay or supply, from their own moneys, what the sufferers might not have been able to recover from the secretary and his sureties.

Loedolff
v.
The Orphan
Chamber.

Art. 71.—“Besides in the case expressed in the foregoing article, Orphan Masters shall not be held responsible in their persons or property for any accidental and unforeseen damage that might befall any estate, inheritance, or private capital or effects of minors or absentees, when such damage has evidently not been caused by their own fault, bad faith (*mala fide*), or neglect. As long as the contrary shall not have been made fully to appear, they are, as all other faithful servants of Government, considered to have acted *bonâ fide*, and conformable to the dictates of prudence, according to their instructions, or other directions to be given to them by the Government for the time being.”

After hearing the evidence and the arguments of the counsel for both parties,

The *Court* held that, 1st, by the gross negligence or maladministration of the late Orphan Board, or such of its members as had the administration of the estate of the plaintiff's wife, the bond in question, if not rendered absolutely worthless, had been so much deteriorated in value, that the plaintiff was not bound to receive it as part of his wife's inheritance, but was entitled to claim the amount of it from the whole members of the board, or at least from those of them by whose neglect or maladministration the deterioration of the bond was occasioned.

2dly. That the plaintiff, by receiving the bond under the reservation and protest contained in his letter of the 5th August, 1826, did not abandon or forfeit his aforesaid claim for the value of the bond, but simply undertook to endeavour to recover the amount of the bond from the sureties, and completely reserved to himself the right of claiming what he might fail to recover from the sureties, from those who had rendered themselves liable for it, by their neglect and maladministration.

3dly. That the plaintiff, in the proceedings which he adopted for the recovery of the amount of the bond, has not been guilty of any delay, or negligence, or maladministration, which can be founded on as depriving him of the claim for the deficiency arising on the bond, which he had previously agreed to endeavour to recover its amount from the sureties.

4thly. That he was not bound to indemnify the Sheriff for the sale of the slaves, attached to the estate of Van Dyk, against the claim of the wife, but did right in declining to proceed further.

5thly. That the action brought by the plaintiff against the present Orphan Chamber is utterly without foundation, that the estate of the plaintiff's wife having never been under the

Leodolf
v.
The Orphan
Chamber.

administration of the present board, its members cannot be liable for any negligence or maladministration which occurred in the management of that estate ; and that judgment must be given for them, with costs.

6thly. That it has been proved that the deterioration of the bond was the consequence of the gross negligence, not only of the secretary, but also of all the members of the late board, and consequently, that the 70th article of the Instructions of the Orphan Chamber does not apply in this case, or protect the members from the plaintiff's claim, and that under the 71st article they are all liable, *singuli in solidum*.

7thly. That even if it had not been clearly proved that all the members had been guilty of gross negligence, yet that gross negligence and maladministration having been proved to have taken place, and as the members of the board, who were innocent of it (if there be any such) have failed to point out, in terms of the 72d article, who were the guilty parties, all must be held to have been guilty.

On these grounds the Court gave judgment in favour of the members of the present board, with costs, against the plaintiff ; and in favour of the plaintiff against the members and secretary of the late Orphan Chamber, for the amount of the bond, under the deduction allowed by the plaintiff, with costs. The plaintiff to reassign the bond, and to assign over the judgment and writ of execution against Van Dyk.

COLONIAL GOVERNMENT v. FITZROY.

[15th October, 1830.]

Vendue—Joint Commissaries of—liable “singuli in solidum.”

Not for acts of their Predecessor.

Colonial
Government
v.
Fitzroy.

This action was brought by the plaintiff against the defendant, as one of the late Joint Commissaries of Vendues.

The declaration set forth that the defendant and Buyskes were, in the month of April, 1824, appointed Joint Commissaries of Vendues, and entered on the administration of their said office. That when they did so, their immediate predecessor, Reitz, the late Commissary of Vendues, was indebted to Government in the sum of Rds. 80,000, which had been lent and advanced to him for the better enabling him to carry on the business and duties of his said office.

That the defendant and Buyskes then took upon themselves, as was their duty, the duty and business of collecting in all sums then due to the Vendue Department, and of discharging

all debts then due by the said department, and did, in consequence thereof, afterwards repay to Government Rds. 60,000, but have not yet repaid the balance of Rds. 20,000, which, with the interest thereon since 30th May, 1826, is still due and owing.

Colonial
Government
v.
Fitzroy.

That by the Ordinance, 7th December, 1827, the office of Commissaries was abolished from the 1st January, 1828; and that, upon taking an account of what was due and owing from the said Joint Commissaries, they were found to be indebted to divers persons, in divers large sums of money, upon divers acceptances which they had given for sales, held by them, and for which, by virtue of the Proclamation of 22d April, 1825, the Government became responsible and liable to pay, in case of the non-payment thereof by the Joint Commissaries, and which acceptances having been dishonoured and not paid by the Joint Commissaries, the Government has since paid the amount thereof;—and that, at the taking of the said account, the said Joint Commissaries were and are still indebted to the Government in a further sum of £712 2s. 4½d., for Government percentages.

That the said Joint Commissaries having been called on for payment of those sums, declared that they were unable then to pay the sum, and did, on the 30th and 31st days of December, 1828, respectively pass certain deeds, whereby they acknowledged that, as such Joint Commissaries as aforesaid, they were indebted to Government in the sum of £9342 7s. 10½d., for the said acceptances and the said Government dues.

That the plaintiff allows the said Joint Commissaries a sum of £247 19s. 6d. from the amount of the above sum due, as having been erroneously charged against them, and a further sum of £1342 7s. 10½d., which was paid by them to Government on the 8th July, 1829, in reduction of the said debt. Wherefore the plaintiff prayed that the defendant might be condemned to pay *in solidum*, 1st, the said first-mentioned sum of Rds. 20,000, being the unpaid balance of the loan to Reitz; and 2dly, the sum of £7752 0s. 6d., being the balance due for the said acceptances and Government dues, after allowing deduction of the said several sums of £247 19s. 6d. and £1342 7s. 10½d., with interest and costs, and tendered such cession of action as the defendant may, by law, be entitled to.

In his plea, the defendant denied that, when the Joint Commissaries entered on their office, they took upon themselves any responsibility for the payment of any sums due by Reitz, beyond what might come to their hands, and stated that they had paid the said sum of Rds. 60,000 in diminution of the debt due by Reitz, because they had collected the same for account

Colonial
Government
v.
Fitzroy.

of the estate of the said Reitz, deceased, and therefore denied his liability for the said sum of Rds. 20,000, as claimed.

The defendant admitted that, on the abolition of the office of Joint Commissaries, an account having been drawn out, the deficiency then appearing due by the defendant and Buyskes for and on account of the acceptances and Government dues, referred to in the declaration, amounted to £9342 7s. 10½d., and that the said balance or deficiency was payable by the defendant and Buyskes, *each the one-half share, to which each of them was, by law, respectively liable*; and that the defendant, then being unable to pay the amount of his share, appearing to be £4671 3s. 11¼d., did on the 30th December, 1828, at the instance of Government, pass a bond, whereby he did acknowledge that, as one of the Joint Commissaries, he, the defendant, was justly indebted to Government in the sum of £3171 3s. 11¼d., making together with the sum of £1500, being the amount of the security previously given by the defendant, the exact moiety of £9342 7s. 10½d. which the Colonial Government admitted to be the amount of the whole claims on the Joint Commissaries of Vendues.

That by reason of the payment by the Joint Commissaries to Government of the sum of £1342 7s. 10½d., admitted in the declaration, one-half thereof, viz., £671 3s. 11¼d., being to be deducted from each of the bonds passed by the defendant and Buyskes, the balance thereafter remaining due by the defendant in respect of his bond of 30th December, 1828, amounted to £2500. That on the 1st of June, 1830, the plaintiff prosecuted the defendant for the said sum of £2500, being the amount due on the aforesaid bond, when, it being shown to the Court in evidence that the sum of £1216 4s. 6¾d. thereof was a debt due by the Vendue Department previous to his, the defendant's, entering on the duties of his aforesaid office, provisional judgment was given against him, the defendant, for the sum of £1891 18s. 3d., with costs, under security *de restituendo*, which said sum of £1891 18s. 3d., together with the sum of £1500, being the amount of the security bond, passed on behalf of the defendant on his entering office, the defendant is ready and willing to pay whenever required, less however a further sum of £123 19s. 9d., being the one-half of the sum of £247 19s. 6d., admitted in the declaration to have been erroneously charged.

The plaintiff at the trial put in a number of documents, and *inter alia*, the appointment of the Joint Commissaries of Vendues, which was as follows:—

“Colonial Office, 28th April, 1824.

“GENTLEMEN,—His Excellency the Governor having considered it beneficial to the public service to abolish the situation of Assistant Commissary of Vendues, and to unite

the salaries of Commissary and Assistant Commissary, and having been pleased to appoint you to be Joint Commissaries of Vendues, and to divide those salaries equally between you, so that each of you shall enjoy a fixed annual salary of Rds. 5000, *requiring however from each of you the full security heretofore given by the Commissary alone*,—I am directed to call upon you to furnish me with a stamp of Rds. 40, being the stamp on which your commission must, according to the standing regulations, be made out, and to submit the names of your sureties for His Excellency's approval.

Colonial
Government
v.
Fitzroy.

"I have, &c.,

(Signed)

P. G. BRINK.

"To C. A. FITZROY, Esq.,
E. A. BUYSKES, Esq.,
Joint Commissaries of Vendues."

The defendant called and examined E. A. Buyskes, the late Joint Commissary, and put in sundry documents, and closed his case.

It was proved that both the defendant and Buyskes, on entering their office, found security each for Rds. 20,000.

That the bond, passed by Buyskes on 31st December, 1828, was to the same effect as that passed by the defendant on the 30th December, 1828.

That the Government had, on the 1st June, 1830, summoned Buyskes for provisional sentence on his said bond, dated 31st December, 1828, but that proceedings against him were stayed in consequence of his having surrendered his estate as insolvent; and that a claim had been made by Government on the insolvent estate of Buyskes for £9342 7s. 10½d.

The Attorney-General maintained, 1st, the liability of the Joint Commissaries for Rds. 20,000, originally due by Reitz, and founded on the letters dated 28th May, by the Secretary to Government to the Joint Commissaries, and 20th June, 1825, by them in reply thereto, and on the alleged laches of the defendant in not recovering this debt from Reitz.

2dly. He maintained that the defendant and Buyskes having been appointed Joint Commissaries, were each liable *singuli in solidum*, (Voet 39, tit. 4, § 6, and Matthæus *ibid.* quot.) and founded upon the terms of their appointment, and of the bond granted by Lord Charles Somerset for £1500, as security for the defendant in this appointment.

He maintained that the bonds taken from the defendant and Buyskes respectively on the 30th and 31st December, 1828, did not amount to a *novatio debiti*, and had not the effect of discharging or diminishing their previous liability, but had merely been taken in *further security* of the same debt, previously due by them.

Colonial
Government
v.
Fitzroy.

The Court stopped Cloete, for the defendant, from entering on the question as to the defendant's liability for any part of the Rds. 20,000, originally due by Reitz.

Cloete then maintained that the defendant was not liable for the whole amount of the deficiencies of the Vendue Department, while under the joint administration of himself and Buyskes, but only for the half, and founded on the terms of their appointment. Voet 45: 2, 2, *in medio*, and 14: 3, 2.

2dly. That even if the defendant had originally been liable *in solidum*, that liability was discharged by what took place in December, 1828, Government having consented to take the bond then granted by the defendant as payment in full of the debt due by him.

3dly. That the Government, by obtaining provisional sentence against the defendant on his bond, and also instituting proceedings against Buyskes on his bond, have lost their claim against the defendant for more than the amount adjudged by that sentence. Voet 45: 2, § 4.

The Court held that the defendant was not liable for any part of the Rds. 20,000, originally due by Reitz, in respect that the plaintiff had failed to prove any laches on the part of the Commissaries of Vendues, to recover that sum from Reitz, or that the non-recovery of any part of that balance was owing to any neglect or fault of the Joint Commissaries. (*Vide* Bell, q.q. Colonial Government, v. McDonald and Breda, 27th May, 1834.)

2dly. That the defendant, as well as Buyskes, were, from the nature of their office and the terms of their appointment, each liable to Government, *singuli in solidum*, for the amount of the deficiencies in the Vendue Department arising under their joint administration, and that Government had not, either by taking the bond of 30th December, 1828, from the defendant, or the bond of 31st December, from Buyskes, or by instituting legal proceedings on either of the bonds, released the defendant from his original liability, and therefore that there must be judgment for the plaintiff for £7752 0s. 6d., with interest from 30th June, 1829, under deduction of the sum of £1500, paid by the defendant's surety, Lord Charles Somerset, since the commencement of this action, and costs, on ceding to the defendant the bond by Buyskes, on 31st December, 1828, the bond in favour of Government by Buyskes' sureties, and the claim of Government to the legal hypothec, arising thereon on the estate of Buyskes, under deduction of the costs incurred by the defendant, in defending himself against the provisional sentence on the 1st June, 1830.

LA FORET *v.* NOURSE.

[9th November, 1830.]

Appeal from Supreme Court—value of cause how to be estimated.
Charter 1st, § 51,—2d § 50, Rule of Court 37.

The defendant presented a petition for leave to appeal against the judgment of the Court of the 30th September, 1830.

Cloete, for the plaintiff, opposed the petition, on the ground that the sum in dispute, exclusive of interest, amounted only to £797 6s. 7d., and that even if interest might be included at all, it could only be such interest as accrued prior to *litis contestatio*, in which case the amount was still under £1000, being only £925 8s. 6d.

The Attorney-General supported the petition.

The Court held that the amount of the sum awarded was the only criterion for the decision of the question whether an appeal is competent, and that, in calculating the amount of the sum awarded, both principal and interest must be included, and therefore granted leave to appeal.

Thereafter a discussion arose whether, under the 37th rule, the Court ought now to decide the question whether the judgment should be suspended, or carried into execution pending the appeal, or whether a separate motion was necessary for this purpose.

The Court, by a majority (Burton, J., dissentiente), decided that a separate motion was not necessary; but gave the parties till next Court day, to argue the point. Burton, J., held that this ought to be the law, but doubted whether the 37th rule would bear this construction. The Court therefore altered the rule.

La Foret
v.
 Nourse.

IN RE TAUTE.

[23d Nov., 1830.]

Sequestration under Old Law,—effect of Rehabilitation.

This was an application by the widow Taute for her rehabilitation. Villiers had been one of her principal creditors. He had afterwards become insolvent, surrendered his estate, and been rehabilitated. He had signed his consent to the widow Taute's rehabilitation. But a doubt was started by the Commissioner for the Sequestrator, whether, after his surrender, and notwithstanding his rehabilitation, it was competent to sign as a creditor.

The Court, on the principle of the decision in the case of Villiers *v.* Cauvin, Dec. 1829, *supra* p. 414, held it was not.

In Re Tautc.

MEYER v. POHL.

[1st Dec., 1830.]

*Sentence—Superannuated—not executable until revived.**Writ of Execution—cannot be enlarged after lapse of the original day.*Meyer
v.
Pohl.

The Court decided that where a writ of execution had been taken out on a final judgment, but not executed within a year thereafter, that no new writ of execution could be taken out, until the judgment had been revived, after the adverse party had been summoned to show cause to the contrary, and that the return day of a writ of execution could not be enlarged after the lapse of the original return day.

IN RE JOOSTEN.

KUYS, q.q. KICHERER v. SPENGLER AND THERON.

[9th December, 1830.]

*Registration—Bond with general Clause of Hypothecation, registered in Debt Register, preferent to Special Mortgage Bond of Slaves, only registered in Slave Register.*In Re Joosten.
Kuys,
q.q. Kicherer
v.
Spengler and
Theron.

Joubert, for Kuys, moved to make absolute the rule which he had obtained, calling on Spengler and Theron to show cause why the scheme of distribution in this case should not be altered, and preference on the proceeds of the slaves Mozes and Christian awarded to the widow Kicherer, as holder of a secretarial bond, registered in the office for the enregistration of slaves, whereby those two slaves were mortgaged, the preference on which proceeds had been awarded to Spengler and Theron, in respect of bonds containing a clause of general hypothecation, and registered in the debt register.

The bond of the widow Kuys had never been registered in the debt register.

The Court unanimously discharged the rule, with costs, in respect of the decision in the case of the Discount Bank v. Dawes, 28th September, 1829, *supra* p. 380.

DICK v. HIDDINGH.

[16th Dec. 1830.]

Construction of clause in Lease as to term of holding after a Sale.

This was an action by the plaintiff, to have the defendant ejected from a house of the plaintiff.

Dick
v.
Hiddingh.

The declaration set forth,—that the house had been let by Gie, the agent of the plaintiff, to the defendant, on the 5th July, 1827, by a notarial agreement, containing the following clause:—"The lessee shall have the right to remain therein during his pleasure, on paying the stipulated rent, or in the event (here certain events were specified), &c., by giving one month's warning to quit the house. It being well understood that the lessee, in case of the predecease of his wife, unexpected sale, or alienation of the house, shall have no right to keep it longer than for the space of two years." That the plaintiff sold the house on the 30th of April, 1830, to R. Logie, and engaged to deliver possession to him on the 15th August, 1830, and that the plaintiff on the 15th May last, gave notice of the sale to the defendant, and warned him to quit the house at the expiration of three months from that date, which he refuses to do.

The defendant, in his plea, admitted all the facts alleged in the declaration, but maintained that by the above clause he was entitled to keep possession of the house, if he chose, for two years after the date of the sale.

The Attorney-General quoted Van der Linden, Inst. p. 240, No. 4, and maintained that the meaning of the clause was, that the defendant, even in case of a sale, should have the house for two years certain from the commencement of the lease.

Joubert maintained that by the contract the tenant, in the event of a sale, should have the house for two years certain from the time of the sale.

The Court were unanimously of opinion that the true construction of the clause was, "that the tenant, in the event of a sale, should have the right to possess the house for two years from the date of the sale."

Judgment for the defendants with costs.

✓ LOMBARD BANK *v.* STORM.

[21st December, 1830.]

Joint Owners of Property hypothecated must all be summoned before Property can be declared executable, even if they have renounced the exception "duobus vel pluribus rei debendi."

Lombard
Bank
v.
Storm.

The Court found that where several co-principal debtors renouncing the exception *vel pluribus reis debendi* hypothecate joint property, that property cannot be legally declared executable, unless all the co-debtors have been summoned: at least, that any such decree cannot affect the interest of those parties who have not been summoned.

POWEL AND HER HUSBAND *v.* PRICE.

[28th December, 1830.]

Injury Verbal,—what not actionable when spoken "in rixa."

When compensated by retort.

Supplemental Oath—when ought not to have been allowed by Resident Magistrate.

Powel and
her Husband
v.
Price.

This was an appeal against a sentence of the Resident Magistrate of Cape Town, by which £7 10s., and costs, were awarded as damages to the respondent, in an action in which he claimed £20 from the defendant, as damages, for the injury he had sustained in his fair fame, credit, and reputation, as a man and a police officer, by the appellant having called him a damned informer, a damned rascal, a damned vagabond, and a damned broken-nosed informer.

It had been proved by three witnesses, examined before the Resident Magistrate, that the words set forth, or others to the same effect, had been used by the appellant to the respondent, on an occasion when he had intruded himself into her house without her permission, on the plea that as there was a ticket on the house advertising it to be let, he had a right to come into the house—(an old grudge existed between the parties). In consequence of this a squabble took place, in the course of which the abusive words were used, and were retorted on the part of the respondent by the word liar, and by shaking his fist in the face of the appellant.

After taking the evidence of three witnesses, the Magistrate had for some reason, which did not appear, allowed the respondent to give a supplemental oath.

The Court held that this was a case of verbal abuse *in rixa*.

That the words in the circumstances of the case were not actionable; that if actionable they had been compensated by what the respondent said and did.

They held that the supplemental oath ought not to have been admitted, and reversed the sentence, with costs, to the appellant.

Powel and
her Husband
v.
Price.

DE WET v. MANUEL.

[28th December, 1830.]

Sale of Slave made "voetstoots," or "as she stood," without warranty, not reduceable "actione redhibitoria," on account of mental infirmity of Slave, of which Seller was ignorant at the time of the Sale.

This was an action brought by the plaintiff against the defendant, to have the sale of a slave of the defendant, made to the plaintiff through the auctioneer, Blore, on 7th August last, annulled, on the ground that the slave is, and was at the time of the sale, insane, and consequently useless, and that this fact was not at the time of the sale communicated to the plaintiff, and to have the note for Rds. 430, granted by the plaintiff for the price, restored to him.

De Wet
v.
Manuel.

The defendant pleaded in defence, that the slave was put up and sold, "*as she then and there stood*," without any condition, stipulation, or warranty whatsoever, as to her state or capabilities, either mental or corporeal, and therefore that he is not liable to the said plaintiff for any real or supposed deficiency which he may have discovered afterwards, and denied that the slave was insane at the time of the sale, or that the sale was an unlawful sale.

After evidence had been led,

De Wet, for the plaintiff, quoted Van der Linden, Inst. b. 1, c. 13, sect. 10, p. 234; Van der Keessel, Thes. 642, and maintained that the term "*voetstoots*," "*as she then and there stood*," which the witnesses mentioned as having been used by the auctioneer when he sold her, was only applicable to the sales of immoveable property, and quoted the Aedilitium Edictum, l. 1, ff. 21, 1, and l. 43, ff. de Contr. emt., lib. 18, tit. 1; Westenberg Compendium ad Pandectas, lib. 21, tit. 1, § 9; Voet 21: 1, § 10 and 11; Matthæus de Auct., lib. 1, 8, § 24, and §§ 25, 26.

Joubert, for the defendant, *contra*, quoted Van Leeuwen, Comment. Roman Dutch Law, p. 386; Voet 18: tit. 1, § 5; 21: 1, §§ 8, 10; l. 4: § 3, ff. de aed. edict., 21, tit. 1.

[Cur. Adv. Vult.]

De Wet
v.
Manuel.

Postea (25th January, 1831).—The majority of the Court (Chief Justice and Menzies, J.,) held, that it had been proved that the slave was sold "*voetstoots*," "as she stood," and for a price much below her value, if she had been free from all fault; that the weight of the evidence in this case went to show that the slave has, since the sale, laboured under an infirmity of mind, arising from an unnatural susceptibility of mental excitation, and that this unnatural susceptibility has not appeared for the first time after the sale, but existed anterior to the sale; that it has been proved that this infirmity has exhibited itself only three times at most, or rather only on two occasions at very great intervals, in a period of seven or eight years anterior to the sale.

That although this mental infirmity certainly renders the slave less valuable, it has been proved that it does not render her unfit for use; that it has not been proved that Manuel, the seller, at the time of the sale, knew that the slave laboured under any such mental infirmity, and therefore he is entitled to the presumption that he did not know of the existence of the infirmity; that this action is strictly the *actio redhibitoria*, and that by it that relief only can be claimed which is provided by the Aedilitium Edictum, and only in consequence of those circumstances, under which the edict has provided that relief shall be given; that a mental infirmity of the kind, under which it has been proved that the slave in question labours, is not a *morbus vel vitium* of the nature of those in consequence of which the edict has provided that the purchaser shall obtain relief *actione redhibitoria*. (*Vide ff.* 21, tit. 1, lex 1, §§ 1, 2, 9, 10, 11; lex 2, lex 4; and Voet 21: 1, § 8, and § 11.)

That even although this mental infirmity were a *morbus vel vitium* of the kind for which the edict provides relief, yet in consequence of the seller's ignorance, at the time of the sale, that the slave laboured under such a permanent mental infirmity, and in consequence of her having been expressly sold *as she stood* (*voetstoots*), that the plaintiff, the purchaser, is barred from any claim by the *actio redhibitoria*. (*Vide* Van Leeuwen's Comment., p. 386; Voet 21: 1, § 10.)

Burton, J., was of a contrary opinion.

Kekewich, J., not having been present at the trial, did not give any judgment, but he concurred in opinion with the majority.

Judgment for the defendant, with costs.

SETON v. BRESLER.

[8th February, 1831.]

Appeal from Circuit Court when not competent under Charter 1st, § 44, 2nd, § 43.

The Court, on an application by Cloete, for Seton, decided that a party cannot appeal against the judgment of a Circuit Court, unless he shall have found security, to the satisfaction of the Circuit Judge, within fourteen days after the judgment is given, in conformity to the 44th section of the Charter.

Seton
v.
Bresler.

IN RE TWYXCROSS AND JENNINGS.

[22nd February, 1831.]

Immoveable Property,—what a sufficient written Obligation to sell and transfer, to entitle Vendee to obtain transfer from the Registrar of Deeds.

Jennings and Twycross, in London, entered into a written agreement that the estate of Kalk Bay, the property of Jennings, should become the joint property of Jennings & Twycross, in equal shares. To this agreement the parties set their hands and seals, duly executed according to the law of England, before two subscribing witnesses, and at the bottom of this agreement, there was a formal attestation by a notary public, "that the before-mentioned Jennings and Twycross, to the said notary and the two subscribing witnesses well known, did in our presence sign and seal this present agreement, written on this stamp.

In Re
Twycross and
Jennings.

"In witness whereof, I have hereunto subscribed my name and affixed my seal, and the said witnesses, Robert Cousins and Robert Crosse, gentlemen, have subscribed their names."

This agreement contained a clause as follows,—“And it is hereby agreed and declared, that the said Stephen Twycross may, upon his arrival at the Cape of Good Hope, have such papers drawn up, and such entries made in the register-book at the Colonial Secretary's Office, as shall be requisite and necessary, justly to entitle the said S. Twycross to be and become a half-owner in and of the Kalk Bay estate and fishery, jointly with the said W. Jennings,” &c.; and another clause to the following effect,—“and we do mutually agree that this agreement may be made and become a notarial and binding act, in and at the colony of the Cape of Good Hope.”

Twycross died on the 16th September, 1828, without having obtained any legal title to the said half.

His executor surrendered his estate as insolvent in September, 1830.

In Re
Twycross and
Jennings.

Jennings, although several times informed by letter of Twycross's death, and required to give instructions as to what was to be done, failed to give any instructions.

The trustee of Twycross's estate applied to the Registrar of Deeds, to transfer one-half of the said estate to him, as trustee, in terms and under the conditions of the agreement.

The Registrar refused so to do.

This day a memorial was presented to the Court by the trustee, praying that the Court should direct the Registrar to make the transfer as aforesaid.

The Court (Burton, J., absent) were of *opinion* that this agreement was probative, and had the effect of a notarial deed executed in this colony, and that the clause above referred to was sufficient to authorise and entitle Twycross, or his representative, to do and cause to be done everything necessary in law for the transfer of the half of the estate to him, and, consequently, that the trustee was entitled now to have transfer as prayed for made in his name, and ordered that the Registrar of Deeds should transfer to W. Eaton, as trustee of the insolvent estate of Twycross, one-half of the said estate, in terms and under the conditions of the said agreement.

On the application of the Attorney-General, on the part of the trustee, it was ordered by the Court that the interest of Jennings in the said estate and fishery be for the present sequestered in hands of the Master, and that the trustee be authorised to manage the said estate, with the advice and consent of the Master, and subject to the conditions of the said agreement, in such manner as shall seem most advisable for the interest of all concerned.

MEYER AND KOK, TRUSTEES OF LUTGENS, AN INSOLVENT *v.*
NEETHLING, EXECUTOR OF LUTGENS.

[3d March, 1831.]

"Fidei Commissum,"—when not revocable by Surviving Spouse.

Meyer and
Kok, Trustees
of Lutgens,
v.
Neethling,
Executor of
Lutgens.

This action was brought to compel the defendant to cancel a bond for Rds. 17,532, containing a general mortgage, granted by the insolvent to the defendant, in his capacity of executor, for the amount of the inheritance left to the said insolvent by his grandfather and grandmother, under *fidei commissum*, and which bond had been taken by said executor for the purpose of continuing the *fidei commissum*, at the time when he paid over to the said insolvent the amount of his said grand-paternal inheritance, as also to have the estate of the insolvent declared freed from the burden of the *fidei commissum*.

The *fidei commissum* was constituted by the joint will of Jan W. Lutgens and his wife B. W. Myne, and was declared to be for behoof not only of their grandson, the insolvent, but also of his children.

Meyer and
Kok, Trustees
of Lutgens,
v.
Neethling,
Executor of
Lutgens.

The will also contained the following clauses,—“All, however, under this condition and understanding, that as this *fidei commissary* disposition arises solely from love and affection on the part of the grandfather, the longest living or executor *shall have the right* (in case it may hereafter appear that the said heir's conduct is good and irreproachable, and by no means of a light or extravagant disposition, but on the contrary, that of a saving man and good housefather, *and also* that he contracts such a marriage which may give every confidence and favourable prospect, that the money shall not suffer any diminution or loss in the hands of the heir and his wife), in such case, *either totally or partly to annul the trust disposition without being obliged* in this respect, or any case, to be in any wise responsible for so doing to any one.

“Finally, the testators reserved to themselves the right and power to make either at the end of this will, or by a separate act, such legacies, prelegacies, or other gifts (with the exception of the appointment of heirs as hereinbefore expressed) out of their property which may be left, or to dispose about the management thereof, in such manner as they shall in time think fit; desiring that whatsoever will be inserted by virtue of this clause, shall be held of similar force and of the same effect as if herein inserted, word for word.”

The grandfather died, and thereafter his widow on the 5th March, 1807, executed the following codicillary clause,—“By virtue of the powers given me by my late husband, which appears in his appointment of heirs, I declare that in case my stepson, Johan Willem Lutgens, *should contract a good marriage, with the approbation of his guardians, or should he reach the age of 25 years, to annul and to discharge the bond of ‘fidei commissum.’ laid upon his inheritance;*” and died in February, 1812, without altering or revoking the last-mentioned codicil.

It was admitted that in August, 1812, after the death of the widow, the insolvent married with consent of the defendant, as his testamentary guardian and trustee in the *fidei commissum*, and attained his 25th year on the 12th October, 1818.

It was admitted that the defendant was appointed executor of J. W. Lutgens, and that the defendant and one Bruichner, now deceased, were appointed executors of his widow, B. W. Myne, and that on her decease the joint estates of her and her deceased husband were entered upon by the respective executors.

The defendant pleaded that the amount of the joint estate,

Meyer and
Kox, Trustees
of Lutgens,
v.
Neethling,
Executor of
Lutgens.

when wound up, was Rds. 45,063, and that, upon the insolvent's marrying with the defendant's consent, the defendant and his co-executor Bruichner paid over to the insolvent unconditionally, in terms of the codicil executed by the widow on the 5th March, 1807, one half of the joint estate, amounting to Rds. 22,531, as being the amount lawfully due to him for his grand-maternal inheritance, and that the defendant, as executor of J. W. Lutgens, did, out of the other half of the joint estate, pay to the insolvent the amount of certain legacies due to him from the estate of the said J. W. Lutgens, but on his paying to the insolvent the residue of his grand-paternal inheritance, amounting to Rds. 17,532, lawfully required him to give the defendant an acknowledgment that the said Rds. 17,532 were only paid to him subject to the *fidei commissum*, whereupon the insolvent executed the bond, dated 21st September, 1813, now sought to be set aside, whereby "he acknowledged to be really and lawfully indebted to J. H. Neethling (the defendant), in his capacity of testamentary executor and guardian over the minor heirs of the appearer's (the insolvent's) late grandfather, being eventually the appearers' children or grandchildren, in a sum of Rds. 17,532, being the capital of the inheritance left to him, the appearer, under *fidei commissum*. Wherefore the defendant prays that the said sum of Rds. 17,532 may be adjudged as a preferent claim on the insolvent estate, on behalf of the insolvent's eventual children.

In the replication the plaintiff pleaded,—“That the grand-maternal inheritance of the said Jan Willem Lutgens does, by law and by the will of the said testators, consist, 1st, of one half of the joint estate held by the said Barbara Wendelina Myne and her predeceased husband, Jan Willem Lutgens, in community, during both their lives, viz., Rds. 22,531; and 2dly, of one half of the inheritance left by the said Jan Willem Lutgens, at his decease, to his said wife, Barbara Wendelina Myne, and the now insolvent, Jan Willem Lutgens, jointly, viz., Rds. 11,265, making together the sum of Rds. 33,797 as the grand-maternal inheritance of the said Jan Willem Lutgens, now an insolvent, and reducing the whole of his grand-paternal inheritance to only Rds. 11,265 6 sk. 1½ st.”

After hearing the counsel for the parties,

[*Cur. Adv. Vult.*]

September,
1831.

Postea.—The Court held that the survivor of the parties who executed the deed constituting the *fidei commissum*, had no power to alter the disposition therein made of the property of the other party, except that given by the clause quoted above, and could only exercise such power under the two conditions specified in that clause, namely the prudent conduct of

the heir, and also his contracting such a marriage, &c.; but the conditions under which the widow in her codicil revoked the *fidei commissum*, are that the heir should contract a good marriage with the approbation of his guardians, or should reach the age of 25 years. Now, taking the execution of this codicil as a declaration that the widow was satisfied of the prudent conduct of the heir, and consequently, as affording that proof of his prudent conduct required by the deed, yet, as the widow died before the heir was married, and indeed, as far as has been shown, before his marriage with his present wife was contemplated, it is impossible that the codicil executed by the widow, or anything done by her, can be held as furnishing the evidence required by the deed that he had contracted "such a marriage which might give every confidence and favourable prospect that the money shall not suffer any diminution or loss in the hands of the heir and his wife;" nor is this defect supplied by the admission that the heir married his present wife with the consent of his guardian, the defendant, because not only is there no proof that the defendant considered this to be "*such a marriage*," &c., &c., but the defendant has expressly denied that he ever considered the marriage in this light,—has stated sufficient reason why he should not have so considered it,—and in proof that he did not consider it such a marriage as justified him in putting an end to the *fidei commissum*, has produced the bond now sought to be set aside, which he caused the heir to execute before he put him in possession of the trust property.

It is therefore clear that the latter of the two conditions, in the event of the fulfilment of *both of which only* the testator gave to his surviving widow power to revoke the *fidei commissum* under which he had bequeathed his property, has not been fulfilled; consequently, that the surviving widow had no power, and that the codicil executed by her cannot have the effect of revoking or annulling the *fidei commissum* created by the deed aforesaid over the property of the testator.

The Court held that the widow had only a life-rent interest in the one-half of her husband's half of the joint estate, left by him to her and the insolvent jointly, and that said half never was freed from the *fidei commissum* imposed on it by the husband, and on the widow's death devolved to the insolvent, not as part of the *grand-maternal*, but of the *grand-paternal* inheritance, and consequently, that the bond was effectual to secure the *fidei commissum* over the whole Rds. 17,532; and gave judgment for the defendant, with costs, but only in so far as respects the rejection of the claim for cancellation of the bond, holding the defendant's claim for preference inadmissible in this action. (*Vide infra*, Neethling v. Trustees of Lutgens, 31st December, 1832.)

Meyer and
Kok, Trustees
of Lutgens,
v.
Neethling,
Executor of
Lutgens.

15th Sept.,
1831.

IN RE THERON.

MEYER v. ROGERSON AND LORENTZ, q.q. THE BURGER
SENATE, AND SMIT.

[15th March, 1831.]

Insolvent Estate. Landed Property not realising at Public Sale the amount of the Mortgage and left unsold, at the instance of the Mortgagee the debt or liability of the Insolvent Mortgagor is not thereby destroyed.

In Re Theron.
Meyer
v.
Rogerson and
Lorentz, q.q.
The Burgher
Senate, and
Smit.

The facts of this case were as follows:—G. J. Vos, by cession from Matveld, was holder of a bond, dated 9th March, 1821, by Theron, for f20,000, with a first mortgage over his house in Rose-street, in which Teubes and Smit were sureties, and also of a bond, dated 24th September, 1824, by Theron, for f8000, with a mortgage over his said house in Rose-street, in which Meyer and Serrurier were sureties. Jan Hoets was holder of a bond, dated 23d January, 1824, by Theron, for f12,000, with a first mortgage over one of Theron's houses in Walendorp, for which the sureties were Meyer and Serrurier. G. H. Meyer was holder of a bond by Theron, dated 19th January, 1827, for £300, with a mortgage over the before-mentioned house in Rose-street, and of another house in Walendorp, and over a third house, also the property of Theron, in Walendorp, which bond contained the usual clause, constituting a general mortgage over all Theron's effects.

Theron's estate was placed under sequestration in April, 1827. Claims were lodged with the Sequestrator on all the before-mentioned bonds.

On the 3d May, 1827, Meyer and Serrurier, as being sureties in Vos's bonds, and Meyer, as a creditor of Theron, in virtue of the bond before-mentioned, applied to the Court, by petition, praying that, in the event of the said house being put up to sale by the Sequestrator, and not yielding the amount of the special mortgages thereon, with interests and costs, authority should be given to the Sequestrator that the said house might be taken over for the above mortgages, and transferred to the memorialists.

Vos, and also the sureties Teubes and Smit, consented to this.

On the 23d August, the Court resolved to accede to the request made by the petitioners, and to grant to the Sequestrator the authority prayed for, as is done by these presents.

On the 24th September, one of the houses in Walendorp was sold, but the house in Rose-street, not having fetched the price put upon it by Meyer and Serrurier, remained unsold. On the 6th October, Meyer and Serrurier presented a second

application to the Court, praying that, if the house in Rose-street should not realise the amount of the mortgages thereon, it *might remain unsold*, on certain conditions, specified in the written consent of the creditors thereunto annexed, and therefore praying that it might please the Court to authorise the Sequestrator *to leave the said house unsold, under the continued securities of the memorialists, and on passing the necessary act of security in favour of Vos.*

In Re Theron.
Meyer
v.
Rogerson and
Lorentz, q-q.
The Burgher
Senate, and
Smit.

The consent of Vos was in these terms,—“I, the undersigned, being the owner of a *schepenkennis* for f 20,000, due by Mr. Theron, Jr., under the first special mortgage of a certain house, &c., situated in Rose-street, declare hereby to consent (*dat het voormelde hypotheec op den naam en in het bezit van gemelde Theron, Jr., verblyf*), that the said hypotheec should remain in the name and in the possession of Theron, under condition, however, that Messrs. G. H. Meyer and J. F. Serrurier bind themselves as sureties and principal debtors for this debt, and become responsible for interest due and further to become due. (Signed) “J. G. Vos.”

G. H. Meyer, as holder of the bond for f 12,000, due by Theron under the second mortgage of the house in Rose-street, “declared by these presents to consent that the first and last hypotheec should remain *in the possession of the said Theron*, under deduction of so much as shall be allowed me by the Government Sequestrator, out of the proceeds of the house and erf in Rose-street, which was sold by him by public sale on the 24th September last.” (The house here referred to was that formerly described in Meyer’s bond as being in Walendorp, and as having been sold on the 24th September.)

Thereafter, on the 27th December, 1827, the Court “resolved to authorise the Sequestrator *to leave the house in Rose-street unsold for account of the memorialists*, provided the same shall not realise the amount for which it is mortgaged at a subsequent putting up to sale, under such guarantee of the mortgage thereon as memorialists have offered in their petition.”

On the 31st March, 1828, the other house in Walendorp was sold, but the house in Rose-street not having fetched the price, which Meyer had fixed, was left unsold.

On the 25th April, Meyer and Serrurier received the title deeds of this house from the Sequestrator, for which they granted the following receipt,—“We, the undersigned, do hereby certify to have received from the Commissioner for adjusting, &c., in conformity with a resolution passed by the late Court of Justice, bearing date 27th December, 1827, the following documents regarding certain house, &c., &c., viz., diagrams,” &c.

(Signed) “G. H. MEYER.
“J. F. SERRURIER.”

In Re Theron.
Meyer
v.
Rogerson and
Lorentz, q.q.
The Burgher
Senate, and
Smit.

On the 29th May, 1828, Meyer and Serrurier executed a notarial bond, in which they declared to bind themselves, instead of Messrs. Teubes and Smuts, *in solidum*, as sureties and joint principal debtors, for the debt of f20,000, due by J. J. Theron to G. J. Vos, by a mortgage bond, dated 9th March, 1821, under special hypothecation of a certain house, (viz., the unsold house in Rose-street), under the express renunciation, &c., &c., *the said J. J. Theron, who did likewise appear to this act, promising to indemnify and to free the sureties in this their engagement, &c., &c.* For the due performance hereof the appearers declare generally to bind their persons and property according to law.

Thereafter, in January, 1829, the Commissioner prepared and made public his liquidation account in Theron's estate in which he awarded the proceeds of the two houses in Walendorp, which had been sold to the respective mortgagees entitled to priority of preference, *and the balance remaining, after paying such preferent creditors, amounting to £60 7s. 9d., was awarded to Meyer, as last mortgagee upon that and the unsold property.*

After awarding all the assets of Theron's estate to the creditors having rights of preference thereon, the liquidation account contained the following entry,—“Wherefore nothing more can be awarded to the following creditors on their claims filed against this estate, viz., G. H. Meyer,—the deficiency of his mortgage bond,—for which however he has no claim on this estate, inasmuch as part of the mortgage in that bond was left unsold at his instance, in consideration of his consent (*vide* also the memorandum underneath the liquidation account), Rds. 3516 6 sk. 4 st.”

The memorandum here referred to was entered on the credit side of the account, and was as follows:—

“*Pro memoria.*—It is here stated that certain house and premises, situated in Rose-street, and mortgaged to the estate of the late H. Matveld for f20,000, and to G. H. Meyer, together with the other fixed property, sold from this estate for the sum of f12,000, has been left unsold, pursuant to a resolution of the late worshipful Court of Justice, bearing date 27th December, 1827.”

The above liquidation account was finally duly confirmed by the Supreme Court on the 28th September, 1829, no objection having been made to it by any party.

Theron died on the 25th December, 1828, having between the date of the above-mentioned sequestration of his estate and his death, been carrying on business as a master-builder, although not rehabilitated, and had become possessed of some property, and incurred certain debts.

Immediately on his death, the Orphan Chamber entered

upon the administration of his estate, and *inter alia*, of the unsold house in Rose-street, which still stood in the register in Theron's name.

On the 9th February the Orphan Chamber sold the house in Rose-street by public sale, when it was bought by Meyer for Rds. 7666 5 sk. 2 st.

On the 25th June the Orphan Chamber surrendered Theron's estate, which had been administered by them, to the Master, as insolvent.

Previous to the election of trustees, all the creditors who voted, proved debts before the Master. Meyer then proved a debt of Rds. 1236, and did not prove any debt on the bond aforesaid.

On the 13th July, 1829, Meyer and Serrurier were duly elected trustees on Theron's estate, which had been surrendered by the Orphan Chamber, and were thereafter confirmed as such by the Court. Vos's and Meyer's mortgages at this time still stood uncanceled in the debt register.

On the 15th November, 1830, Meyer and Serrurier framed a liquidation account and scheme of distribution. In this account, the net proceeds of the house in Rose-street are stated at £526 2s. 6d., and they have awarded to G. J. Vos, as the first mortgagee, £512 0s. 0d., and to the Collector of Taxes 11 7s. 3d.

£523 7 3

leaving a balance of only £2 15s. 3d. on the house in question.

The moveable property and outstanding debts of Theron realised in the gross £339 7s. 7½d., £300 of which was awarded to Meyer, in virtue of the general hypothec contained in Theron's bond to him, by which he is paid in full to the exclusion of the concurrent creditors, whose debts, amounting to about £350, have all been contracted subsequent to the first sequestration of Theron's estate.

On the account of distribution, framed by the trustees, the Master has reported his opinion to be:—"That the account should be directed to be amended by the trustees. That the sale of the house and premises should be taken out of the account, as forming no part of the estate, and the whole of the proceeds of the moveable property awarded in equal proportions to the concurrent creditors, which would yield them 17s. 6d. in the pound."

Thereafter, Meyer obtained a rule against the concurrent creditors of Theron, to show cause why, notwithstanding the report of the Master, the liquidation account framed by the trustees, should not be confirmed by the Court.

And on the 15th March, Cloete, for Meyer, argued in support of the liquidation account, as framed by the trustees, and

In Re Theron.
Meyer
v.
Rogerson and
Lorentz, q.q.
The Burgher
Senate, and
Smit.

In Re Theron. the Attorney-General, *contra*, when the Court gave the
Meyer following judgment:—

v. 1st. It has been maintained for the concurrent creditors,
Rogerson and that, in consequence of what took place under the former
Lorentz, q.q. sequestration of Theron's estate, at the instance of Meyer, and
The Burgher with the consent and participation of Vos, with respect to the
Senate and house in Rose-street, in obtaining the authority of the Court
Smit. that it should remain unsold, this house was taken over by
Meyer and Vos, in full and absolute satisfaction of their debts,
in so far as regarded either Theron himself or his estate,
and consequently, that, from and after that transaction, all
Theron's former estate then under sequestration (except said
house) was wholly relieved from all claim on account of either
Meyer or Vos's debt, and Theron himself was discharged from
all further liability for either of those debts. That this was
declared in the distribution account of the Commissioner,
which has been since finally confirmed, and, consequently, that
Meyer, not having timeously objected to that report, is not
now entitled to attempt to enforce any claim which, in that
report, is declared null.

In answer to this, it has been remarked that, in that very
distribution account, £60 is awarded to Meyer, in respect of
his debt, from the proceeds of the other immoveable property
sold; consequently that the validity and subsistence of his debt
was recognised to some extent, and that the entry made by
the Commissioner that Meyer had no claim for the deficiency
was a mere expression of the Commissioner's opinion, from
which, in the distribution of that estate, no injury did or could
result, and to which, consequently, he had no interest, nor was
under any necessity to object, or to pay any regard. But the
Court hold that the proceedings with respect to the house in
Rose-street had not, in law, the effect which the concurrent
creditors wish to ascribe to them, and that Theron continued
personally the debtor to Vos and Meyer, who also continued
to have the security of the house in Rose-street for their
debts.

There is nothing whatever in the circumstance of the titles
of the house in Rose-street having been delivered to Meyer
and Serrurier by the Commissioner. After the house in
Rose-street was withdrawn from the administration of the
Commissioner, he had nothing more to do with the titles,
which were very properly placed under the custody of Meyer
and Serrurier, who had an interest in preventing it from being
thereafter prematurely or disadvantageously sold by Theron,
in whose name it still remained in the land register.

The Court therefore hold that nothing which occurred
under the first sequestration had the effect of discharging
Theron, or any part of his property, except that which was

actually administered and distributed in the first sequestration from the debts of Vos and Meyer.

2dly. It has been maintained by the concurrent creditors that, even although, notwithstanding the proceedings under the sequestration, the debts due to Vos and Meyer by Theron should still be held to subsist, so as to give them a good claim against Theron and his subsequent estate for the amount thereof, yet that these bonds containing special and general mortgages, and by which the debt was originally constituted, have been virtually cancelled, and have now no force and effect whatever in law, by reason of their having been filed as claims against Theron's estate when under sequestration, and of the liquidation account in said sequestration having been finally confirmed by the Court, in consequence of which Meyer is not now entitled to any preference, but must rank for his debt on Theron's second estate, as a concurrent creditor. In support of this proposition, the concurrent creditors have founded on a practice which the Commissioner, in his report, has stated to have formerly "obtained in the late Chamber for regulating Insolvent Estates, and with the late Sequestrator, Mr. Van der Riet (but more recently fallen into disuse), *of recommending*, at the closing of an insolvent estate, and before its distribution, that all hypothecations on landed property under such estates should stand annulled and cancelled by a decree of the Court."

In Re Theron.
Meyer
v.
Rogerson and
Lorentz, q.q.
The Burgher
Senate, and
Smit.

But the Court hold that no authority or principle has been shown, which can lead to the conclusion that, by the law of this colony, the validity or legal effect of a bond is in anywise destroyed, impaired, or affected, by having been filed against an estate under sequestration, which estate has been distributed in terms of a liquidation account confirmed by the Court, except to the extent to which the holder of the bond has received payment of the debt in the bond, out of the proceeds of the estate, or to which a preference has been awarded to some other creditor on property which had been either specially or generally hypothecated in said bond, in security of the debt constituted by said bond.

According to the practice referred to by the Commissioner, nothing else was done by the Court than to decree that the immoveable property of an estate under sequestration, which had been sold, and the proceeds thereof distributed among the creditors to whom such property had been hypothecated, according to their respective rights of preference, should, in consequence thereof, be freed and relieved in future from all former hypothecations thereof, and that such hypothecations should be so cancelled and annulled as no longer in any wise to affect or burden such immoveable property. The bonds by which the hypothecations had been constituted were in no wise

In Re Theron.
Meyer
v.
Rogerson and
Lorentz, q.q.
The Burgher
Senate, and
Smit.

affected by such decree, except that the hypothecation of such immoveable property as aforesaid ceased to exist, and the bonds thereafter were precisely in the same situation as if the hypothecation of such immoveable property had been inserted therein.

3dly. It has been maintained by the concurrent creditors, that creditors, whose debts have been contracted by a person whose estate had been placed under sequestration, as insolvent, subsequent to such sequestration, are by law entitled to a preference over all property acquired by such person after his sequestration, to the exclusion of all creditors whose debts had been contracted before the sequestration, even although the latter were holders of bonds containing a general hypothecation of their debtor's effects.

The Court hold that no authority has been produced in support of this proposition, and that there is no such rule of preference as that contended for recognised by the law of this colony.

On these grounds the Court confirmed the liquidation account framed by the trustee, with costs to Meyer.

WOOLS v. PROTECTOR OF SLAVES FOR THE CAPE DISTRICT.

[15th March, 1831.]

Ordinance No. 33, § 5,—Appeal not competent against conviction of an offence under the Slave Order in Council.

Wools
v.
Protector of
Slaves for the
Cape District.

In this case, an appeal against the sentence of the Resident Magistrate of Simon's Town, whereby the appellant was convicted of an offence against the Slave Order in Council and adjudged to pay a fine of £10, was dismissed with costs, as being incompetent under the provisions of the Ordinance No. 33, § 5.

BREDA AND OTHERS, TRUSTEES OF BURGHER, v.
DE LEEUW.

[17th March, 1831.]

Fraud,—on what grounds Deed reduceable under Common Law, as being "in Fraudem Creditorum."

Breda and
Others,
Trustees of
Burgher,
v.
De Leeuw.

This action was brought to have the transfer of certain slaves, made in October, by Burgher, the insolvent, to the defendant, set aside, as being *in fraudem creditorum*.

The declaration set forth that, in or about the month of October, 1828, the said Burgher, being then insolvent, and unable to pay all his lawful debts, executed a deed of transfer,

to and in favour of the defendant, of four slaves named Carolus, Kees, Felix, and Jacob, in order, as is pretended by the defendant, to liquidate a debt of Rds. 3000, and some arrears of interest due to him by Burgher, on a bond by which the said slaves were mortgaged, but the plaintiffs aver that the slaves were worth much more than the amount of said debt, and that double that amount has been offered, and may still be obtained, for them, and therefore prayed that the said transfer be rescinded, and the defendant adjudged to transfer and redeliver the said slaves to the plaintiffs, as trustees of the insolvent estate of Burgher, with liberty to the defendant to prove his claim, if he have any, on said estate.

Breda and
Others,
Trustees of
Burgher,
v.
De Leeuw.

The defendant, in his plea, denied that the slaves were obtained by him *in fraudem creditorum*,—denied that Burgher, in October, 1828, was insolvent, or that the defendant knew him to be so, and averred that Burgher was indebted to him at that date in a sum of Rds. 3000, and interest thereon for four years, for which the four slaves were specially mortgaged, independent of certain other sums, which the said Burgher was also indebted to the said defendant; and the defendant further saith that, being about to prosecute Burgher for payment of the aforesaid sums, he did, of his own free-will, agree with the defendant to give said slaves in payment of the above consideration to the defendant, and the same were accordingly legally transferred, and the said Burgher was discharged from his debt.

After evidence had been led by both parties,

Joubert, for the plaintiff, quoted Voet 42: tit. 8, § 5, and offered on the part of the trustees to pay the full amount of the defendant's debt and interest, on condition that the slaves should be transferred to them. He also maintained that it was clear from the evidence that the defendant was aware of Burgher's insolvency at the time of the transaction.

Cloete quoted Voet 42: tit. 8, § 18, and maintained that before the passing of the Ordinance 64, in virtue of the Proclamation of September, 1805, no transaction could be set aside as being *in fraudem creditorum* which took place more than twenty-eight days before the surrender of the debtor as insolvent.

The Court held that it had been proved that Burgher was insolvent in October, 1828, and knew himself to be so; that the defendant, at the time of transfer to him of the slaves, knew that Burgher was insolvent; that it was proved that the value of the slaves was much greater than the amount of the debt due to the defendant, the discharge of which was the consideration in respect of which the transfer was made; therefore that the transaction was *in fraudem creditorum*, and must be annulled, with costs.

CLOETE v. BERGH.

[17th March, 1831.]

Surety,—Bound as Joint Principal Debtor, whether discharged by Creditor's release of a "Pignus Prætorium" on the Estate of the Original Debtor, whether acquired before or after the Suretyship's Obligation was entered into.

Cloete
v.
Bergh.

This action was brought to recover payment of a certain sum alleged to be due by the defendant, as surety for Hoffman.

The declaration set out that the said defendant, together with four others, by a deed, bearing date 12th November, 1802, bound himself as surety and joint principal debtor for Jan. B. Hoffman, in one-eighth share of a sum of 16,000 guilders, which the said Hoffman owed by a notarial bond of the 23d October, 1802, to C. A. Haupt, and whereby the said defendant engaged to pay one-eighth share of any deficiency which might arise to the holder of the said notarial bond in recovering the same, and that the said debt and bond having been duly ceded and transferred to the plaintiff for a balance of 5312 guilders (£132 16s.), and the said debt having been duly proved upon the insolvent estate of Hoffman, nothing has been awarded thereon. Wherefore the plaintiff claims from the defendant, upon cession of action, £33 4s., being the one-eighth share of the deficiency of £132 16s. together with 100 per cent. interest due thereon.

The defendant, in his plea, maintained that he is no longer bound as surety by the said bond, because he says that one D. P. Haupt having become the legal holder of said bond, by cession dated 8th July, 1804, proceeded at law against the principal debtor, Hoffman, for payment of the said bond, and having obtained judgment thereon against Hoffman on the 3d November, 1808, revived on 3d May, 1810, the said judgment was lodged for execution in the Insolvent Chamber, on 21st May, 1810. That on the 14th August, 1810, the said Hoffman surrendered slaves and other property to the Insolvent Board, and a *pignus prætorium* was thus constituted, sufficient to secure the satisfaction of the said judgment; but that, by the act or at the instance of the plaintiff, the judgment was withdrawn from execution, and the said *pignus prætorium* abandoned, or discharged, without the knowledge or consent of the defendant, and the said judgment was ceded and transferred to the said plaintiff on the 14th December, 1810; and the said defendant further says that between December, 1810, and October, 1817, several other judgments were recovered against the said Hoffman, and among them one in the year

1811, in favour of Backstrom, on a bond for which the said plaintiff was likewise bound as surety.

Cloete
v.
Bergh.

Joubert, for the defendant, maintained that it was proved by the evidence that an effectual and sufficient *pignus prætorium* had been constituted in security of the sentence Haupt v. Hoffman, and that this *pignus prætorium* having subsequently been discharged, Bergh, the surety, was absolutely freed from his obligation.

He maintained,

1st. That Bergh was discharged in a question with the present plaintiff, the assignee of the sentence, even supposing the *pignus prætorium* was discharged by Haupt, the cedent, and although at the time of the cession the plaintiff did not know that the *pignus prætorium* had been discharged.

2dly. And *a fortiori*, if, when the plaintiff obtained the cession, he knew that the *pignus prætorium* had been previously discharged by the cedent.

3dly. That in point of fact the *pignus prætorium* was not discharged by the cedent, but by the plaintiff, after he had acquired the cession.

4thly. That although it should be held that a *pignus prætorium*, which has been taken by a creditor, after the surety has bound himself as such, may subsequently be discharged by the creditor, without thereby discharging the surety; yet that, in the present case, the plaintiff did not become the creditor in the debt in question, and consequently, the defendant was not under any obligation to him as surety, until the sentence was ceded to the plaintiff, and that as the *pignus prætorium* was ceded along with the sentence, the *pignus*, in a question between the plaintiff and the defendant, must be held to have been constituted at the time when the defendant's obligation to the plaintiff, as surety, was constituted; and therefore, according to the general rule, the surety is discharged, in consequence of his creditor having discharged the *pignus*.

Cloete maintained the contrary of all those positions, and quoted Van Leeuwen, Cens. For., pt. I., lib. 4, tit. 9, § 14; Voet 42: 4, § 5; 46: 1, §§ 27, 30; 46: 2, § 6; l. 28, Cod. de Fid. (8, 41); l. 8, Cod. de Novat. (8, 42.)

[Cur. Adv. Vult.]

Postea.—Ordered that this case stand over, on account of the illness of advocate Joubert.

By agreement, ordered to stand over until the final argument day of next term.

[This case was not afterwards brought under the consideration of the Court.]

VILLIERS v. LE RICHE.

[29th March, 1831.]

Civil Imprisonment.—*An Insolvent, after the Liquidation Account had been confirmed, is entitled to oppose a Decree for Civil Imprisonment by objecting to the Legality of the Claim proved in his Estate.*

Sequestration under Old Law.—*Liquidation Account when confirmed is "Res Judicata" only as to Assets awarded and distributed.*

Villiers
v.
Le Riche.

Villiers sold a place to Le Riche. Le Riche alleged that De Villiers could not give him a legal title to a part of the land sold, and refused to pay the price or receive transfer. De Villiers denied that he was bound to give a title to that piece of land. De Villiers brought an action against Le Riche to receive transfer and to pay the price. This was referred by the late Court to the Sitting Commissioner, who, after hearing parties, remitted the case to the whole Court, since when no farther proceedings were taken in that case.

Le Riche became insolvent. The Sequestrator advertised for sale that part of the property sold, to which Villiers was willing to give a legal title. Le Riche remonstrated with the Sequestrator against this, and proposed that this part of the property should be abandoned to De Villiers; but the Sequestrator proceeded, and sold the property, without selling or taking any notice of that part as to which the dispute had arisen, and awarded the whole proceeds to De Villiers, in satisfaction of his claim for the price.

These proceeds were much less than the amount of the price claimed by De Villiers. Nothing was awarded to De Villiers out of any part of Le Riche's estate, in satisfaction of the deficiency between the amount of the proceeds awarded, and the price claimed.

The liquidation account was afterwards confirmed, without any objection being made to it either by De Villiers or Le Riche.

This day, a decree or civil imprisonment was prayed for by De Villiers against Le Riche for the said deficiency.

The Court held that nothing which had taken place foreclosed Le Riche from now maintaining his defence that he was not liable in payment of the price, in respect of his not having got a legal title to all the land, which he alleged to have been sold to him, and that the plaintiff could not enforce his claim until he obtained, either in the action which was still pending, or in some other action, judgment, sustaining his claim.

Decree of civil imprisonment refused with costs. (*Vide* Nisbet & Dickson *v.* Richardson, 1st April, 1828, *supra* p. 298.)

Villiers
v.
Le Riche.

Postea.—The same application was refused, with costs, on the same ground.

6th March,
1832.

The same was found in Mackenzie *v.* Cornelis, 31st August, 1833, and in Van den Berg *v.* De Lima, 14th February, 1837. In the latter, the estate had been wound up under § 50 of the Sequestrator's Instructions.

HAWKINS *v.* FITZROY.

[29th March, 1831.]

Vendue, Joint Commissaries of,—whether to be considered as “Socii” or as “Mandatarii,” and liable “singuli in solidum” or “pro rata.”

The plaintiff's declaration set forth that, in 1824, the defendant, C. A. Fitzroy, and E. A. Buyskes, now an insolvent, were duly appointed Joint Commissaries of Vendues, and thereupon entered upon the duties of their said office, and continued to act in such capacity on the 20th December, 1827, hereinafter mentioned. That on the 20th December, 1827, a public sale was held, at the instance of the said plaintiff, by or under the direction of the said Joint Commissaries of Vendues, of sundry goods, the net proceeds whereof amounted to £247 19s. 6d., and a copy of the vendue-roll of such sale was duly signed by D. F. Lehman, who then was a clerk, acting in the office and under the direction of the said Joint Commissaries, and which was duly delivered to the said plaintiff. That the said sum of £247 19s. 6d. became due and payable on the 20th March, and the said plaintiff, on or shortly after the said 20th March, presented the said copy of the said vendue-roll at the office of the said Joint Commissaries, and did duly demand payment of the same; but payment of the same, or any part thereof, was not then or since made by the said Joint Commissaries. That the said E. A. Buyskes became insolvent on or about the 29th May last (1830), and the said plaintiff hath proved against his estate for the said amount of £247 19s. 6d., but nothing has as yet been awarded to him in respect thereof. Wherefore the said plaintiff prays judgment against the said defendant for payment of the said sum of £247 19s. 6d., with interest thereon since the 20th March, 1828, and all costs of suit, the said plaintiff hereby offering to the said defendant, on payment thereof, such cession

Hawkins
v.
Fitzroy.

Hawkins
v.
Fitzroy.

of action and such right to claim against the estate of the said E. A. Buyskes as he may, by law, be entitled to.

The defendant, in his plea, admitted all the facts alleged in the declaration, but maintained that, notwithstanding thereof, he is not liable for the amount claimed, inasmuch as the said defendant saith that the said plaintiff did not demand from the Commissaries of Vendues the amount of the said vendue-roll within three days after the same became due,* and that the said plaintiff did not report within five days afterwards the default of the said Commissaries of Vendues to make the said payment, as severally prescribed by the aforesaid Proclamation, and that the said plaintiff having further proved his claim upon the insolvent estate of E. A. Buyskes (who by himself or his sureties is liable for his default) can at most legally demand from the said defendant the moiety of the said claim of £247 19s. 6d., or £123 19s. 9d., which the said defendant has already tendered to the said plaintiff, together with the interest thereon from the 20th March, 1828, and the costs incurred by the said plaintiff, up to the date of the said tender, and which tender was refused by the plaintiff.

The Attorney-General, for the plaintiff, maintained that both Fitzroy and Buyskes were liable *singuli in solidum*, and therefore that he was entitled to claim the whole debt from Fitzroy, and quoted the decision of the Court in the case of the Colonial Government v. Fitzroy, 15th October, 1830, *supra* p. 492.

Cloete maintained, 1st, that the Commissioners were not liable *singuli in solidum*; and

2dly. That, even admitting that they were liable *singuli in solidum*, and, consequently, that the plaintiff was entitled to claim the whole debt from Fitzroy, still he was only entitled to do so on condition of giving cession to Fitzroy, if demanded by him, of all right of action and securities which he had against and on the estate of the other Joint Commissioner; and, consequently, that if the plaintiff has done any act by which he is now unable to cede any security, which once existed over the estate of the Joint Commissioner, and which, but for that act, might have been rendered available to the defendant, he has released the defendant, except as to his own half, and that in this case, Hawkins, by not giving notice to Government, has lost his recourse against Government, and consequently has destroyed the hypothec which Government had on Buyskes' estate, and which, if the plaintiff had not released Government, might have been rendered available to the defendant, and quoted Voet 45: 2, 2.

* The defendant subsequently admitted on record that the demand had been made by the plaintiff within three days.

The Attorney-General, in reply, quoted Voet 50: 8, n. 4, *in fine*, and maintained that Hawkins had never accepted the proffered responsibility of Government, and therefore was not in the situation of a creditor, who had released a co-surety, or destroyed collateral security of a hypothec.

Hawkins
v.
Fitzroy.

[*Cur. Adv. Vult.*]

Postea.—In consequence of doubts suggested by the following authorities,—Institutes, lib. 3, tit. 17; l. 11, §§ 1, 2, *ff. de duob. reis.* (45. 2); l. 3, Cod. *de duob. reis.* (8. 40); l. 2, *Auth. Cod. eod.*; Groenewegen ad Cod. 8. 40; Vinnius ad Inst., 3: 17; Van Leeuwen, Cens. For., pt. I., lib. 4, tit. 17, § 2; Voet 45: 2, 2, and 4, *in fine*; Cujac tom. 3, 1762; Van der Linden, b. 1, c. 14, sect. 9, p. 203, from which it is clear that by the law of Holland co-obligants are not liable *singuli in solidum*, unless they have specially bound themselves *in solidum*,—whether Fitzroy and Buyskes, in respect of the vendue-note on which Hawkins' claim is founded, are liable, *singuli in solidum* or only *pro rata*, which point was not fully discussed on the former hearing of the cause, the parties were ordered to argue this point on this day.

The Attorney-General maintained that the plaintiff's claim did not rest solely on the vendue-note, but on the liability of the defendants, in virtue of their appointment as *Joint Commissaries*, which made them liable to the public as *negotiorum gestores*, or mandataries, if not as *socii*, upon which last character he did not insist; and in either of these capacities were liable *singuli in solidum*, and he quoted Domat 1: 15, § 3, num. 13; l. 60, § 2, *ff. Mand.* (17. 1); Voet 14: tit. 3, n. 2. [This appears adverse to his argument.]

Cloete maintained that, although the Joint Commissaries might be the mandataries of Government, they did not stand in that relation to the public, and referred to the Proclamations 2d May, 1806; 3d September, 1813; 22d April, 1825; Instructions for Country Districts, arts. 198–209 (p. 757); and 329 (p. 770); Fagel's App., 1st June, 1808; Instructions for Cape District, art. 9 (p. 99); but even although they were to be considered as mandataries, he quoted Voet 17: l. n. 8; Groenewegen ad leg. 60: *ff. lib.* 17, tit. 1. He quoted Voet 39: 4, 6, to show that although the Joint Commissaries of Vendues might be liable as mandataries to the Government *in solidum*, they were not liable to any private person, except *pro rata*. He also quoted *ff.* 17, 2, 4. (*Vide* Pothier on Contracts, part 2, c. 3, art. 7, n. 258.)

The Court held that there was nothing in the defence set up by the defendant, on the ground that the plaintiff did not claim payment from the Colonial Government within the term prescribed by the Proclamation, 22d April, 1825, and therefore

Hawkins
v.
Fitzroy.

that the only question for decision now is, whether the defendant is liable *singuli in solidum*, or *pro rata*; and that, as the Attorney-General has admitted that there is nothing in the terms of the vendue-note (which must be considered merely as evidence of the fact of the sale of the defendant's goods, and of the amount for which they were sold) which could render the defendant liable *in solidum*, if, in the absence of any such document, he would only have been liable *pro rata*, the only ground on which the plaintiff's claim against the defendant *in solidum* can be founded, is the liability which, by virtue of the defendant's appointment, attached itself to him, as one of the Joint Commissaries of Vendues, in consequence of the plaintiff's goods having been sold under the direction of the Joint Commissaries of Vendues.

The first appointment of Vendue-master for Cape Town was in 1793, and the first article of his Instructions was as follows:—"He shall be responsible for all vendue-moneys of moveable as well as of immoveable property sold by him in his capacity, as has been the case with Vendue-masters heretofore," &c.

This office was executed by only one person at a time, and under the said liability, until the 16th April, 1824, when the defendant and Buyskes were appointed Joint Commissaries of Vendues by the following advertisement in the *Government Gazette*:—"His Excellency the Governor has been pleased to appoint C. A. Fitzroy, Esq., and E. A. Buyskes, Esq., to be Joint Commissaries of Vendues." (*Vide* also the letter of appointment, *supra* Colonial Government v. Fitzroy, 15th October, 1830, p. 494.)

No new instructions were issued as to their responsibility.

The majority of the Court (Chief Justice, Burton, J., and Kekewich, J.) held that the effect of this appointment was to render the defendant and Buyskes *socii* in the exercise of the duties and in the liabilities of their office, and on that ground, and that ground alone, held that the defendant was liable *in solidum*, and gave judgment for the plaintiff, with costs.

Menzies, J., concurred with the Court that if the defendant and Buyskes were *socii*, they were each liable *in solidum*, but he was of opinion that their appointment had not the legal effect of rendering them *socii*, as no law was passed or instructions issued by Government, when this joint appointment was made, defining the nature or extent of the responsibility of the Joint Commissaries (the only law on the subject continuing to be the first article of the Instructions of 1793 quoted above). He held that the obligation into which Fitzroy and Buyskes tacitly entered, by accepting the offices of Joint Commissaries, would, if reduced into writing, have been of the following effect:

"I, C. A. Fitzroy, having been appointed one of the Joint Commissaries of Vendues, and I, E. A. Buyskes, having been appointed one of the Joint Commissaries of Vendues (or, we, C. A. Fitzroy and E. A. Buyskes, having been appointed Joint Commissaries of Vendues), hereby bind and oblige ourselves to be responsible to the sellers of goods by vendue for the proceeds thereof.

Hawkins
v.
Fitzroy.

"C. A. FITZROY,
"E. A. BUYSKES."

"Now, by the Roman Dutch Law, such a written obligation would only infer a *liability pro rata*, and not *singuli in solidum*. (*Vide* the authorities quoted *supra*, under date the 21st June.)

He held that, even if the defendant and Buyskes were to be considered liable to the plaintiff or the public, in the character of joint *mandatarii*, *not being joint socii*, it was far from being free from doubt that they would be liable *singuli in solidum*; *non obstante* Voet 17: 1, 8; for see Groenewegen *ad l.* 60, § 17. tit. 1, *ff.*; Van Leeuwen, Cens. For., pt. I., lib. 4, tit. 17. § 2.

But he held that they never were the *mandatarii* of the plaintiff; that the Government was his *mandatarius*, and the defendant and Buyskes were the mere agents of Government, and at common law were under no liability or obligation to the plaintiff, except in so far as they could be proved to have the proceeds of the plaintiffs' goods in their possession. (*Vide* Voet 17: 1, 8.)

And to prove that Government must be deemed to be the *mandatarius* of the sellers of goods by vendue, he referred to the different Proclamations respecting sales by vendue, quoted above by the defendant's counsel.

On these grounds he held that the tender made by the defendant was sufficient, and that, on paying the sum tendered, the defendant should be absolved, with costs.

OVERBEEK v. CLOETE.

[31st March, 1831.]

Surety—having renounced the benefit of excussion—not released by Creditor's refusal to take a Bond from him, the Surety, and cede Debt, or to discuss Debtor.

In this case, provisional sentence was claimed against the defendant, who had bound himself as surety and co-principal debtor, renouncing the *beneficium excussionis* for the balance due by the principal debtor.

Overbeck
v.
Cloete.

Overbeek
v.
Cloete.

The defence was, that in 1827, the defendant had insinuated the plaintiff either to accept bonds which he offered in satisfaction of the debt, and to cede to the defendant the debt, in order that he might operate his relief against the principal debtor, or that he should immediately discuss the principal debtor, or otherwise that he, the surety, would hold himself released.

The creditor did not comply with either of those demands, and the defendant, on the authority of Voet 46: 1, § 39, *in fine*, maintained that he was released from all liability, because, if the creditor had proceeded to discuss the principal debtor at the time when he was required to do so by the defendant, he showed that the debtor's property was then fully adequate to satisfy the debt.

The Court held that the authority quoted applied only to simple *fidejussores*, and not to sureties who had renounced the *beneficium excussionis*, and that there was nothing, either in law or equity, in respect of which the defendant, in consequence of the facts alleged by him, was entitled to plead that he was released.

Provisional sentence, with costs. (*Vide Vermaak v. Cloete*, 31st August, 1836.)

LOMBARD BANK v. HAMMES, THE HUSBAND OF STORM.

[31st March, 1831.]

Evidence of Power of Attorney in Bond.

Proclamation, 1st June, 1808.—De Mist's Instructions to Lombard Bank.

Lombard
Bank
v.
Hammes, the
Husband of
Storm.

This was an action by the plaintiff to recover from the defendant, as married in community of goods, and as legal guardian of his wife, the amount of a balance due on a bond, alleged to have been executed by the wife before her marriage, with costs.

The defendant, after entering appearance, had made default to plead, but the Attorney-General was in Court to watch the proceedings for the defendant.

The Court absolved the defendant in the instance, because the bond on which they were sued bore to have been executed before the Commissioners of the Bank by C. Storm's father, therein stated to have been duly qualified as her attorney, by a notarial deed therein referred to, and there was no proof produced by the plaintiff that the defendant had ever so qualified her father to act for her, holding that the mere assertion

of this fact in the bond was not any evidence of it, notwithstanding of the 9-11 articles of De Mist's Instructions to the Lombard Bank, or the 15th section of the Proclamation of the 1st June, 1808, quoted by the plaintiff; but reserved the question as to the defendant's right to any costs until parties should be heard thereon. (*Vide infra inter eosdem*, 20th December, 1832.)

Lombard
Bank
v.
Hammes, the
Husband of
Storm.

BORRADAILES, q.q. KENNY, v. MAYNIER.

[10th May, 1831.]

Evidence.—Oath of party when refused to be taken.

In this case, in which the pleadings were not yet closed, the plaintiff applied to be allowed to give his oath as to certain facts, which, according to an affidavit of his attorney, appeared to the latter to be of such a nature that the Court might ultimately deem it necessary and competent that the plaintiff's oath should be taken, on the ground that the plaintiff was under the necessity of proceeding to India before the pleadings could be closed.

Borradailes,
q.q. Kenny,
v.
Maynier.

He proposed that the oath should be taken, if thought proper, before a Commissioner, in presence of the defendant, subject to his interrogatories, and should be sealed up until it should be ascertained whether it was necessary or competent that the plaintiff's oath should be taken.

The Court were of *opinion* that, in the circumstances of the case, the application was incompetent, and refused it.

ZIEDEMAN EX PARTE ZIEDEMAN.

[10th May, 1831.]

Insanity.—How to proceed to have Insanity declared and Curator appointed.

An application was made by the elder brother of an alleged lunatic, praying that he should be appointed curator to the lunatic.

Ziedeman
ex parte
Ziedeman.

The Court refused the application as prayed, but appointed S. Merrington, attorney, to be curator *ad litem* to the alleged lunatic, and granted a writ to the applicant to be served on the alleged lunatic and his said curator *ad litem*, to appear before the Court on the — day of ———, by his said

Ziedeman
ex parte
Ziedeman.

curator, with his witnesses, if he have any, and show cause why he should not, by judgment of this Court, be adjudged to be of unsound mind, and incapable of managing his affairs, and why curators should not be appointed for the care of his person, and for the care and administration of his estate ; and declared that in future they would follow a similar course in all similar cases.

IN RE HOFFLEY.

[24th May, 1831.]

“Cessio Bonorum” refused during subsistence of Sequestration.

Civil Imprisonment suspended during Sequestration of Estate, and Insolvent liberated.

Ordinance No. 64, sections 29 and 95.

In Re Hoffley. On the 18th May, Hoffley applied to the Court for a writ of *cessio bonorum*, but it appearing that the petitioner had surrendered his estate as insolvent, under the provisions of the Ordinance No. 64, and that the sequestration still subsisted,

The Court held that the application for a writ of *cessio* was, in those circumstances, incompetent, and the petition was withdrawn. (*Cessio* refused on same grounds in *Hovil & Matthew v. Poultney*, 12th March, 1835.)

The petitioner had been imprisoned at the instance of Wolff & Bartman, under a decree of civil imprisonment, prior to the surrender of his estate as aforesaid, and was in Court under the custody of the gaoler. It appearing to be at least questionable whether the insolvent was not entitled, during the subsistence of the sequestration, to his liberation, in virtue of the provisions of the 29th and 95th sections of the Ordinance No. 64, the Court ordered him to be liberated in the meantime, and granted him a rule *nisi*, calling on Wolff & Bartman to show cause why he should not be liberated under the provisions aforesaid, during the subsistence of the sequestration.

Wolff & Bartman not appearing this day to show cause against the said rule, it was made absolute, and Hoffley ordered to be discharged from custody.

WATERMEYER, q.q. BREHM *v.* WATERMEYER AND
LINDEQUE.

[1st June, 1831.]

Summons.—Service, made by Deputy Sheriff, who was the Plaintiff, when good.

In this case, Brehm, the real plaintiff, was the Deputy Sheriff of Uitenhage, and as such had actually served the summons in this case, but the High Sheriff having in his own name returned that the summons was duly served, the Court held that there was no good objection appearing against the service.

Watermeyer,
q.q. Brehm,
v.
Watermeyer
& Lindeque.

IN RE ANDERSON.

MORRISON *v.* ANDERSON AND STENHOUSE.

[1st June, 1831.]

Sureties by Bond for Prosecuting an Appeal, when Bond can be enforced by Rule of Court without regular Action.

Anderson, on the 27th day of September, 1821, appealed to the King in Council, against a sentence of the late Court of Appeals, and on the 7th November, 1821, in the said Court of Appeals, the defendant produced, as his sureties, George Anderson and Nicol Stenhouse, the defendants, who then and there executed the following bond, whereby they “submitted themselves to the jurisdiction of this Court, and also to the King in Council, and the Lords Commissioners appointed, &c., &c., and severally bound themselves and their heirs, &c., &c., for the sum of Rds. 1000, that the said appellant should well and truly prosecute the appeal heretofore notified by him on the 21st day of September last past, and also answer the condemnation, and pay such costs and expenses, as shall be awarded by this Court, or by the King in Council, or by the Lords Commissioners appointed, &c., &c., and unless they shall so do, they jointly and severally consent that execution shall issue forth against him or either of them, their heirs, &c., &c., goods and chattels, wheresoever the same shall be found, to the value of the sum aforesaid:—and in witness whereof they, the said George Anderson and Nicol Stenhouse, have hereunto set their hands and seals the day and year first above written.

(Signed) “GEO. ANDERSON, (S.)
“NICOL STENHOUSE, (S.)

In Re
Anderson.
Morrison
v.
Anderson and
Stenhouse.

“In my presence,
(Signed) “J. P. SERRURIER.”

In Re
Anderson,
Morrison
v.
Anderson and
Stenhouse.

Morrison obtained a rule against Anderson and Stenhouse to show cause why the appeal should not be dismissed, as not having been duly prosecuted, and why Anderson and Stenhouse, in virtue of their obligation in the above bond, should not have execution issued against themselves and their effects for the amount of costs incurred by him in respect of said appeal, as the same should be taxed by the master.

It was proved that the appeal had not been duly prosecuted, and that certain costs had been incurred by Morrison.

The Attorney-General maintained that the obligation in the above bond could not be enforced except by a regular action.

The Court (Burton, J., *dissentiente*) held that, under the terms of the bond, it was competent for Morrison to enforce the bond by rule, and made the rule absolute, with costs.

DU PREEZ v. THE PROTECTOR OF SLAVES.

[June, 1831.]

Slave, not registered as such by error, absolutely free.

Registration of Slaves,—error cannot be redressed by Rule, but by Action.

Proclamations, 26th April, 1816, 20th June, 1817, and 30th January, 1818,—application.

Du Preez
v.
The Protector
of Slaves.

Joubert moved to make absolute a rule which he had obtained against the Protector of Slaves, to show cause why the record in his office of the slaves belonging to said J. G. du Preez shall not be amended, and why the name of Marinus, erroneously enregistered in the records of the slave registry, as the slave of J. G. du Preez, shall not be cancelled, and in lieu thereof the name of Phyllis of this colony, son of Zarin, be substituted, the said Phyllis having been purchased by the said J. G. Du Preez on the 22d April, 1816, at a sale, held on account of the estate of the late Pieter du Preez.

In support of the rule, affidavits of J. G. du Preez and others were produced, that by a mistake of Deneys, to whom, as being his agent, J. G. du Preez had sent a list of his slaves for registration, under the provisions of the Proclamation of 26th April, 1816, and who, at the same time, had charge of the slave register, or of Fulk, who succeeded him in the charge of the register, the name Marinus had been inserted instead of Phyllis, who was actually the slave of Du Preez, and whose name was omitted altogether out of the register, and has never since been inserted in the register.

The Court discharged the rule, holding, 1st, that even although the mistake had actually been committed, still that it could not be corrected by a rule on the Protector of Slaves, as keeper of the registry, without the alleged slave having been made a party, which had not been done.

Du Preez
v.
The Protector
of Slaves.

2dly. That even if the alleged slave had been made a party, the Court would not have been warranted in making by a rule such an alteration in the slave registry as that prayed for, which would have the effect of registering, as a slave, a person, apparently a freeman until he had been adjudged to be a slave by the Court in a regular action, brought for the purpose of having been declared to be a slave.

3dly. That in consequence of the Proclamations of the 26th April, 1816, 20th June, 1817, and 30th of January, 1818, Phyllis was now absolutely entitled to his freedom.

WOLFF v. VAN HELLINGS.

[22d June, 1831.]

Injury—Verbal—What Words not Actionable.

This was an action for the *amende honorable et profitable* of £15, to the South African College, on the ground that the defendant had, while the plaintiff was holding a public sale, used these expressions of and concerning the plaintiff, "*Jouw gemeene bliksem. Jouw bliksemche smeerlap.*" (The literal meaning of the words is,—“You common lightning. You lightning dirty rag;” but in the sense in which they are commonly used in this colony, mean “You low rascal. You rascally blackguard.”)

Wolff
v.
Van Hellings.

The defendant admitted having used the words, but alleged that he had used them after the plaintiff had, without cause, refused him credit for the trifling sum of a few shillings, even for a few minutes, being the price of an article which had been knocked down to him by the plaintiff, and had said aloud that he feared he would lose the amount by the defendant.

The replication admitted the refusal of credit, but justified it on the ground that, by the conditions of sale, the plaintiff had a right to do so, and denied the other allegations in the plea.

After evidence had been adduced by both parties,

Joubert, for the plaintiff, quoted Grotius *Introd.*, b. 3, c. 36; Van der Linden, *Comp.*, p. 250; Voet 47: 10, § 7, 8; ff. 47: 10, l. 15; in support of his argument that the words were actionable, and argued that the words were proved to

Wolff
v.
Van Hellings. have been used publicly, in presence of many persons, *cum animo injuriandi*, and were of a vilifying tendency, and that they had been used to the plaintiff without any provocation on his part.

Cloete quoted Grotius Introd., b. 3, c. 36, § 1, 2, 3; *ff.* 47: 10, l. 15, § 4; Voet 47: 10, § 1, *in fine*.

The Court (by a majority) gave judgment for the defendant, with costs.

The Chief Justice and Burton J., held that the words were not, by the Roman Dutch Law, sufficient to support an action *ad palinodiam* and for the *amende profitable*. (*Vide* Brissonius de Verb. Sign., voce "*Mos*," p. 863, col. 1, *in medio*; Matthæus de Crim., 47: 4, c. 1, § 1, 2, &c.)

Kekewich, J., was of the same opinion, but rested more on the vagueness and uncertain meaning of the words.

Menzies, J., held that the words were equivalent to words "You low rascal," "you rascally blackguard," and that those words were sufficient to support the action, having been used, as he thought it proved they had been, *animo injuriandi*, without any provocation. (*Vide ff.* 47: 10, l. 1, and l. 15; Voet 47: 10, § 7 and 8, and § 1; Brissonius *ut supra*.)

STIGLINGH v. DE VILLIERS.

[12th July, 1831.]

Sale—Breach of Contract of—no Defence against—Payment of price for what delivered to Buyer.

Stiglingh
v.
De Villiers. It being admitted in this case that there had been a contract entered into between the parties, by the plaintiff, a butcher, for the sale of the skins of the sheep slaughtered by him, to the defendant, at fifteen stivers;—the Court held that this price must be paid by the defendant as long as the skins had been delivered, and that the subsequent breach of the contract which the plaintiff was alleged to have committed, although it might give the defendant a good claim of damages against the plaintiff, afforded no defence against his claims for the contract price of the skins actually delivered under the contract; and therefore gave judgment for the plaintiff, with costs.

IN RE CHABAUD.

LUCK v. CHABAUD.

[26th July, 1831.]

Partnership—"Beneficium divisionis"—between Partner of Dissolved Firm.

Chabaud and Nicholl were in partnership, and as partners incurred a debt to Luck. The partnership was dissolved before Luck made any claim for his debt. Chabaud became insolvent, and his estate was placed under the administration of the Sequestrator. Luck claimed for the whole amount of the partnership debt against Chabaud's estate, although Nicholl continued solvent. The Sequestrator ranked Luck for only one-half the debt.

In Re
Chabaud.
Luck
v.
Chabaud

Joubert, for Luck, this day moved that the liquidation account should be amended, and Luck ranked on Chabaud's estate for the whole debt.

Cloete, for Chabaud, opposed this motion.

The Court were of *opinion* that Chabaud was entitled to the *beneficium divisionis*, Nicholl being solvent and within the jurisdiction of the Court, and consequently, that the Sequestrator had properly ranked Luck only for one-half; and discharged the rule, with costs.

NIEKERK v. LETTERSTEDT.

[2d September, 1831.]

Pleading.—A Plaintiff having claimed in his Declaration against the Defendant "in solidum,"—when he cannot on the same Declaration claim "pro parte."

Evidence.—Witness on account of Interest, when refused.

The plaintiff, jointly with one A. W. van Niekerk and the late J. F. Dreyer (whose widow and sole executrix was now the wife of the defendant, married in community of goods), was appointed executor of the last will and guardian of the minor heirs of Aletta Heyns, widow of C. van Niekerk.

Niekerk
v.
Letterstedt.

After the minor heirs had become of age, they sued the plaintiff, singly, to pay them the amount of their inheritance, and recovered judgment against him for £345 18s. 6d., and costs. (*Vide supra* Niekerk v. Niekerk, 30th June, 1830, p. 452.)

The plaintiff brought this action to recover back the above

Niekerk
v.
Letterstedt.

sum of £345 18s. 6d. from the defendant's wife, as being the sole executrix and representative of her deceased first husband, Dreyer.

The plaintiff, in his declaration, alleged that Dreyer "had taken upon himself the sole management and administration of the said estate of Aletta Heyns. That he had received all the moneys arising from the said estate, and put out the same at interest, or used the same for his own benefit, and that he and his representative had failed to render any account of his administration or of any part of the property entrusted into his hands in his aforesaid capacity, &c., &c.

"And the plaintiff further saith that the defendant is solely liable to the repayment of the aforesaid sum, inasmuch as the defendant's wife's late husband, Dreyer, had the entire control and administration of the effects of the said estate, and received all the moneys in the estate, and has never accounted for or paid over any part thereof to the plaintiff or to the co-executors."

The defendant, in his plea, denied all the facts alleged as to Dreyer's sole administration; and alleged that the plaintiff had disposed of and invested the whole amount of the inheritance due to the minors on his own sole authority and responsibility, without the consent and concurrence of Dreyer, and by his improper management had occasioned a loss to the estate of Rds. 3300, and was therefore justly and properly condemned to pay to the minors the said sum and interest thereon, amounting to £345 18s. 6d., by the judgment referred to in the declaration; and the defendant denied that he is liable, either solely or conjointly, to the repayment of the aforesaid sum, or any part thereof.

The plaintiff, in his replication, denied the allegations in the plea, and joined issue.

The plaintiff called A. W. van Niekerk, who had been appointed co-executor and guardian of the estate and heirs of Aletta Heyns along with the plaintiff and Dreyer.

Joubert, for the defendant, objected that he had a direct interest in the issue of the suit, inasmuch as, if it were found that Dreyer had been the sole administering guardian (which was the fact the witness was called to prove), the judgment by which this was found would be a bar to any action at the instance of Dreyer's representative (the defendant) against the witness, to contribute as co-executor and co-guardian to relieve the defendant of any part of the sum which he may be condemned to pay the plaintiff in this action.

The Court sustained the objection.

After the plaintiff had examined his witnesses, the *Court held* that the plaintiff had not only failed to prove Dreyer's sole administration, but, on the contrary, had proved that, at the

most, he had, in all that he did, acted only jointly and in concert with, and with the knowledge and consent of, the plaintiff.

On this ground, Joubert, for the defendant, maintained that he was entitled to a non-suit, and that under the form in which the plaintiff had brought this action, he was not entitled to recover anything, in respect of the defendant's being *jointly* liable with the plaintiff, as a co-executor and co-guardian.

Cloete, *contra*, maintained that the plaintiff was entitled to recover to the extent of the defendant's joint liability.

The Court held that the plaintiff had failed to prove the only claim made by him in his declaration, namely, against the representative of Dreyer, *in solidum*, in respect that he had been the sole administering executor and guardian; and that he could not in this action recover, in respect of any other claim than that made in the declaration; and absolved the defendant from the instance, with costs.

Niekerk
v.
Letterstedt.

THE KING v. HIGGINSON.

[8th September, 1831.]

Review of Proceedings of Inferior Courts—Power of Supreme Court not restricted to grounds of Law only.

Charter, §§ 34 and 50, and Ordinances No. 40, § 5; No. 44, § 6; and No. 73, § 3, explained.

The Court held that, under the 34th section of the Charter, the Supreme Court has jurisdiction to review the proceedings of all inferior Courts, not merely on the grounds specified in the 5th section of the Ordinance No. 40, and section 3 of the Ordinance No. 73, but whenever such proceedings may be erroneous in any respect whatever; and that the word "*review*" in the Charter is to be taken in the most extensive sense, and is not restricted to review on grounds of law appearing *ex facie* of the record. That no power was given by the 50th section of the Charter to the Governor in Council, with the advice of the Chief Justice, to make any rule, which can limit the power of review conferred on the Supreme Court by the 34th section of the Charter.

The King
v.
Higginson.

That the Ordinances Nos. 40 and 73 merely declared certain cases, in which review was competent, and were not intended. and had not the effect, to alter the provisions of the 34th section of the Charter.

That the Ordinance No. 44, § 6 (repealed by No. 20, § 56), merely enacted that *no appeal* should lie from the inferior Court in criminal cases, and had no reference to the power of review bestowed on the Court by the 34th section of the Charter.

The King
v.
Higginson.

[The grounds of the application was an application that the sentence of the Resident Magistrate was given contrary to evidence.]

The *Court* were also of *opinion* that if the provisions of the Ordinances Nos. 40, 73, and 44 had been in opposition to the provisions of the Charter, the Court were bound to act in obedience to the provisions of the Charter, and to disregard the contradictory provisions of the Ordinances; and made the rule absolute that the defendant should have a writ to bring up the record of the proceedings of the inferior Court.

DE WAAL, EXECUTRIX OF ROWLES, v. N. E. MOSTERT.

[1st December, 1831.]

Mandate.—*A Bond executed in favour of a Mandatary (Agent) "or his Administrators," may be sued upon by the Administrator of the Mandatary, after death of Mandant, the principal.*

De Waal.
Executrix of
Rowles,
v.
N. E. Mostert.

In this case it was objected against the claim for provisional sentence, that Rowles, in whose favour the bond sued on had been passed, *as agent of Messrs. Wood & Dixon, being dead*, the mandate in his favour was thereby put an end to, and did not pass to his executrix.

Answered,—In the bond, the defendant "promised and undertook to pay unto the said agent, his order, administrators, or assigns."

That the present plaintiff was the administrator of said agent's estate, and therefore entitled to sue *ex terminis* of the bond.

The *Court repelled* the objection in respect of this answer, and granted provisional sentence, with costs.

IN RE HOFFMAN.

HOFFMANS CREDITORS v. WOLMERANS.

[6th December, 1831.]

Guardian.—*A person having acted and described himself as Guardian (Protutor), liable as such towards Minors.*

In Re
Hoffman.
Hoffman's
Creditors
v.
Wolmerans.

On the 25th October, the Court made absolute a rule, that the claim of the Wolmerans on Hoffmann's estate should have a preference, on the ground that Hoffman had been the guardian of the Wolmerans, and that the claim was for part of their property, which had been under the guardianship of Hoffman.

On the 22d November, Brand had obtained a rule on the Wolmerans to show cause why the rule of the 25th October should not be opened up, on the ground that Hoffman had never been the guardian of the Wolmerans, and in proof of this now produced—

In Re
Hoffman.
Hoffman's
Creditors
v
Wolmerans.

1st. The will of Johan Gustaf Wolmerans, dated 6th April, 1793, whereby he appointed the Orphan Chamber executors of his will, and the guardians of the minor legatees.

2dly. A codicil, dated 2d August, 1797, whereby he excluded the Orphan Chamber, and "request after my death the guardian of my minor legatees and executor, Mr. Carel Philip Zastron, that he will take them under his charge, and act with them in such a manner as is stipulated in the aforesaid will, &c. It shall, moreover, be optional with the said Zastron, if he should prefer to nominate also some other person, to appoint thereto whomsoever he may think fit."

3dly. A codicil, dated 6th August, 1797, of the following tenor,—“It is my express will that the Orphan Masters be excluded from my estate, but I select of my own accord the gallant Mr. C. P. Zastron, and another person whom the aforesaid Mr. Zastron shall think fit to appoint, as the administrators of my estate.”

4thly. And the deed, whereby Zastron assumed Hoffman as joint *administrator*, and not as guardian, and which deed referred as its warrant only to the codicil of the 6th August, 1797; and on these grounds contended that Hoffman had been and acted merely as administrator, and not as guardian, and, consequently, that the claim of the Wolmerans was not entitled to any preference on his estate.

Cloete proved that Hoffman had acted and described himself as guardian, and quoted Voet 20: 2, 17; 27: 5, 1, in support of the preference.

Brand admitted that, after what Cloete had proved, he had no case.

The rule of the 22d November was therefore discharged, with costs.

NEETHLING, q.q., v. MINNAAR.

[13th December, 1831.]

Surety.—Notice given by a Surety, "before" having paid the debt, to Debtor to pay such debt, not sufficient Notice to enable Surety to demand from Debtor "after" having paid debt and obtained Cession.

In this case, the debtor had bound himself to pay on three months' notice, and the plaintiff bound himself as surety.

Neethling, q.q.
v. Minnaar.

Neethling, q.q.
v.
Minnaar. On the 28th February, the surety gave notice to the defendant "to bring up within three months from the service thereof the sum of Rds. 1000, being the amount for which I bound myself as surety for him, the defendant, as per notarial bond, dated 5th October, 1824."

In November, the defendant having failed to pay, the surety paid the debt and took an assignation, and thereafter brought the present action, in defence against which the defendant pleaded that the notice given by the surety, before he was holder of the bond, was not equivalent to the notice to which he was entitled by the condition of the bond, and made presentation to pay after three months from the date of the service of the summons.

The Chief Justice, Burton, J., and Kekewich, J., held the defendant's plea good (Menzies, J., *dubitante*: vide Voet 46: 1, 33); and gave judgment for the plaintiff. Execution to be suspended until three months from the date of the service of this summons (23d November, 1831).

No costs.

PFAFF v. SCHENCK.

[15th Dec., 1831.]

Pleading.—Rule of Court 20.

Notice of Declaration,—how it may be given when the Defendant cannot be found.

Pfaff
v.
Schenck.

The defendant did not appear or plead, and this day an affidavit was produced by the plaintiff that the summons had been duly served on the defendant, that he had since left the lodgings at which he then lodged, and gone to the country as the plaintiff was informed, and verily believed, for the purpose of avoiding the process of the Court.

The Attorney-General, therefore, prayed that he might be allowed to give notice, by advertisement in the *Gazette*, that the plaintiff had filed his declaration, instead of serving notice to that effect on the defendant.

Ordered that the plaintiff do give notice of the filing of his declaration in the *Gazette*.

IN RE STILWELL.

SCHEUBLE AND VAN DEN BURG *v.* DURHAM.

[20th December, 1831.]

Hypothec of Landlords on "Invecta et Illata,"—preferable without attachment to "Pignus Prætorium."

Cloete moved to make the rule absolute which he had obtained against Durham, to show cause why the account and plan of distribution, as framed by the trustee, awarding to the said E. Durham a preference over the whole of the moveable effects of the said insolvent, for one and the current year's rent, shall not be amended, and why the effect of the attachment of the moveable property by the messenger of the Resident Magistrate's Court, for debts due to said G. J. Scheuble and C. A. van den Burg, the said messenger being in possession at the time of the insolvency, shall not be deemed and accounted in law to give a priority in the legal order of preference, in the distribution of the said insolvent estate, upon the proceeds of the property taken under attachment.

In Re Stilwell.
Scheuble and
Van den Burg
v.
Durham.

Cloete, in support of the rule, quoted Van Leeuwen, Rom. Dutch Law, b. 4, c. 13, § 12, p. 361, and Voet 20: 2, 3.

The Attorney-General, *contra*, referred to the authorities quoted in Burton on the Insolvent Law, p. 140.

The Court held that the landlord's hypothec did not require any judicial arrest to make it effectual over the tenant's property, so long as it remained in the landlord's house, and gave him a preference on the property *in the house*, which could not be defeated by any attachment of such property in the execution of sentences, and that the judicial arrest was only necessary to prevent the property being removed from the house, and the hypothec thereby defeated.

Rule discharged, with costs.

BRINK, q.q. BREDA, *v.* VOIGT AND BREDA.

[29th December, 1831.]

1. *Will.*—*Codicil.*—*Their constructions as to institution of Heirs, —whether by Codicil.*
2. *Agent.*—*Judgment against Defendant, "as Agent," not executable against him personally.*

1. F. C. Voigt and his wife, H. M. Stadler, on the 28th June, 1787, executed a mutual will, which contained the following clauses:—

"And now, entering upon a new distribution of property,

Brink, q.q.
Breda,
v.
Voigt and
Breda.

Brink, q.q.
Breda,
v.
Voigt and
Breda.

the testators declared to nominate and institute each other mutually, that is, the first dying, the survivor of them, as his or her *sole or universal heir or heiress*, in all the goods and effects to be left behind at their demise, nothing whatever excepted, in order to be entered upon by the survivor as free personal and allodial property, without contradiction of any body, *under this obligation, however*, to educate and provide for the children already begotten or further to be gotten during this marriage, in an honest and Christian-like manner, until they become of age, marry, or enter into some other approved situation, unless when to each of such children such a sum of money shall be paid over, as or in lieu of paternal or maternal inheritance, as the survivor conscientiously, and according to the situation of the estate, shall find to be due to them. The testators did further declare expressly to reserve to themselves the power and right to alter or to amplify this their will, either at the foot thereof or by a separate act under their own signatures, or to make such additions or retractions thereto as they may deem advisable, desiring that all such alterations and amplifications shall be of the same effect and value as if they had been inserted word by word in these presents."

On the 26th March, 1809, C. C. Voigt, one of the testators' daughters, was married to M. van Breda.

On the 10th May, 1830, the said testators executed the following codicil:—

"By virtue of the reservatory clause in this our will, dated 28th June, 1787, executed, &c., &c., it is our will and desire that our two daughters, C. C. and M., shall not rank or be considered as our lawful heirs in our estate, but that, on the contrary, the smallest legitimate portion shall be awarded to them, and that in lieu of them their lawful children shall rank as the lawful heirs to the whole of our estate."

The testator, Voigt, died on the 10th October, 1830, and Breda, by his agent, Brink, the plaintiff, brought this action against the defendants, the executors of the testator, to have the codicil declared null and void, and the defendants adjudged to pay his wife that portion to which she would have been entitled under the will, if the codicil had not been made.

Cloete, for the plaintiff, maintained that, by the will, the children of the testators were instituted heirs as to what was left them by the will, that the effect of the codicil would be to destroy this institution of heirs, and of new to institute other heirs, and that, by law, neither of these things could be done by a codicil, and quoted *ff. 29, tit. 7, l. 10*; *Bynk. Quæst. Juris Privati*, 3: 4, pp. 386, 394, 388; *vide Voet 29, tit. 7, § 5*; *Van Leeuwen, Cens. For.*, pt. I, lib. 3, c. 2, § 2.

The Attorney-General, for the defendant, quoted the above authorities, and *Voet 28: 1, 29*, and maintained that in this

case the codicil neither took away from the heir appointed by the will any part of the inheritance therein bestowed on the heir, nor disposed of any part of the testator's inheritance left undisposed of by the will, but that what by the will was bequeathed to the children over and above their legitimate portion, was left as a legacy, with which the heir was burdened, and that all that was done by the codicil was to revoke the legacy (*i.e.*, everything given to the plaintiff by the will over and above the legitimate portion) given to the plaintiff, and to bequeath it to her children in her stead; consequently, that the codicil was, by law, valid, and must be given effect to.

Brink, q.q.
Breda,
v.
Voigt and
Breda.

The Court gave judgment for the defendants, with costs.

2. In this case, in which the summons and declaration set forth that the defendants were summoned to answer, &c., &c., to the plaintiff, *as the agent of* Breda, and in which, at the trial, the power of attorney, by Breda, authorising the plaintiff to sue, had been put in, the Court had given *judgment for the defendants, with costs, as above.*

Cloete, for the plaintiff, this day moved to have the writ, which had been issued in execution of the said judgment for costs, set aside, for irregularity, and the sum which had been levied from the plaintiff under the writ repaid, on the ground that the writ directed the Sheriff to levy the costs from the goods of the plaintiff, Brink, who had not been the real plaintiff in this action, but had sued only in the capacity of mandatary, and had not, by the judgment of the Court, been condemned personally to pay the costs, and quoted Van Leeuwen, Cens. For., pt. II., b. 1, c. 33, § 27.

1st March,
1832.

After hearing the Attorney-General, *contra*, the Court ordered the writ to be quashed, and the money levied to be repaid.

HANCKE, q.q., v. BRED AND HEUSER.

[10th January, 1832.]

Partnership,—limiting Partners' liability,—of what effect.

In this case, the Court decided that an agreement between two partners dividing and limiting their responsibility for the debts of the company, had no effect against partners who had contracted with the firm previously to this agreement having been entered into between the partners. (See another branch of this case, reported under *De Smidt v. Blanckenberg*, 3d August, 1843.)

Hancke, q.q..
v.
Breda and
Heuser.

LEVIEN v. OMFRAY.

[7th February, 1832.]

Witness, expense of,—Notice to—that he will be summoned,—equivalent to “Subpœna” when Witness complies with Notice.

Levien
v.
Omfray.

The Attorney-General, for the plaintiff, objected to the Master's taxation of the costs in this case, which had been adjudged to the defendant, in so far as the Master had allowed £13 10s. as the expenses of a witness, who was detained in the colony from the 14th November till the day of trial, 20th December, at the rate of Rds. 5 a-day, and maintained that as the defendant might have had the witness examined *de bene esse*, he ought not to be allowed more than the expense which would have been occasioned by such an examination.

It was admitted that the witness had been a material witness, and it was proved by the affidavit of the witness that, although not actually served with a *subpœna*, he had notice that he was to be so, and that he had in consequence remained in the colony solely for the purpose of giving evidence at the trial.

Objection repelled, with costs. (*Vide* Tidd's Practice, 9th ed., pp. 810–814, and Phillips on Evidence, vol. 1, p. 6.)

MEYER v. CARLISLE, CAMPBELL, AND OTHERS.

[6th and 20th March, 1832.]

1. *Pleadings.—Variance between Summons and Declaration as to parties summoned and declared against.*
2. “*Exceptio Rei Judicatæ vel Litis Finitæ*,”—when no bar to same action.

Meyer v.
Carlisle,
Campbell,
and Others.
6th March,
1832.
20th March,
1832.

In this case two exceptions had been pleaded.

1. The first was an exception to the declaration, on the ground that five persons had been summoned, and only three declared against as defendants. The Court, after hearing counsel and taking time to consider of their judgment, decided that the plaintiff's not declaring against all the parties called in the summons as defendants was not such a variance from the summons as to entitle the defendants to except to the declaration on that ground, and repelled the exception.*

2. The second exception was to the action itself. The defendant pleaded, “that the same question, and between the

* Cons. Perezius ad Cod. lib. 3, tit. 40, per tot.; Carpzovius Defn. Forens, pt. I., constit. 2, def. 25; Brunneman ad Cod. 3. 40.—[Ed.]

same parties, or between parties in whose place they now stand, has already been decided by a final sentence of the Commission of Circuit, dated 24th November, 1827, which sentence was confirmed by a subsequent decision of the Circuit Court, dated 10th November, 1828, and which sentences have become a judgment; and the defendants aver that it is contrary to law and practice now to commence a fresh suit on the same question again. The defendants therefore propose the exception *litis finitæ*," &c.

Meyer
v.
Carlisle,
Campbell,
and Others.

In support of the exception, the Attorney-General and De Wet, for the defendants, referred to a sentence of the late Commission of Circuit, dated 24th November, 1827, *Pohl v. Rafferty and Daniel*, and to another sentence of the Circuit Court, dated 15th November, 1828, *Rafferty and Daniel v. Pohl*, and quoted *Vromans de Foro Competenti*, lib. 3, c. 9, § 3, not. 5, p. 236, and Judgment of Supreme Court, 17th September, 1829.

Cloete, for the plaintiff, *contra*, referred to the record in the said two causes before the Commission of Circuit, and before the Circuit Court, and maintained that the conditions of sale now founded on had never before been the ground of action between the parties, and quoted *Voet* 44: 2, 1, and the *cas. inibi cit.**

The Attorney-General and De Wet replied.

[*Cur. Adv. Vult.*]

(*Vide l. 16, l. 20, ff. de Except. rei Jud.* (44, 1); *Zoesius Com. ad. ff. 44, 2, n. 2*; *Vinnius ad Instit.*, lib. 4, 13, § 5, et § 11, n. 7.)

Postea.—The Court unanimously held that the *exceptio litis finitæ* was ill-founded in the circumstances of this case, on the ground that the plaintiff's present cause of action was not the same with the cause of action in the actions before the Circuit Courts.

20th March,
1832.

Menzies, J., was of opinion that when a plaintiff had recovered judgment against a defendant he could not be barred, *exceptione rei judicatæ vel litis finitæ*, from abandoning that judgment and instituting a new action, founding upon the former cause of action, although he did not found on the former judgment, provided he claimed nothing more than or different from, but only what had been adjudged by, the former judgment; that in these circumstances, it was a sufficient answer to the *exceptio rei judicatæ* for the plaintiff to plead that his claim in the new action was *secundum quod judicatum* in the former action.

Burton, J., was of a different opinion, holding that, although it was competent for a plaintiff, instead of obtaining execution

* *Add. Pothier ad Pand.* 44, 2, n. 14–18; *Huber, Obs. Rer. Jud.*, obs. 35, pp. 128, 129; *Idem Præl. ad ff.* 44, 2, n. 6.—[Ed.]

Meyer v.
Carlisle,
Campbell,
and Others.

on a judgment, to bring a new action against the defendant, provided the former judgment was expressly founded on as the cause of action, still that the *exceptio rei judicatæ* was a bar to any new action founding only on the original cause of action, and not founding on the former judgment, even although he claimed nothing more than, or different from, but only what had formerly been adjudged to him.*

Chief Justice gave no opinion on this point. (*Vide Voet* 42: 1, §§ 30, 31, 35.)

The following is a translation of the case referred to by Voet 44: 2, 1, being Consult. 251 of Dutch Consultations, vol. 4, p. 439,—

A sued B for the payment of a certain sum of money for goods delivered. B was therefore condemned in the claim, with costs. B paid a part of the sum with the costs in which he was condemned. Some years after the death of A, B not paying the remainder being again summoned before the same judge by the heirs of the aforesaid A for the said remainder, proposed the *exceptio rei judicatæ*.

Quæritur.—Whether the said exception ought to be admitted or rejected?

The above-mentioned *casus positio* having been seen by the undersigned, and consideration of the question therein proposed having been had,—it is thought (under correction) that *exceptio rei judicatæ* has no place, and in such a case cannot be admitted, because the same cannot be proposed by any one who has a judgment to his prejudice *ut inquit Julianus in l. 16, ff. de Exceptio rei Judicatæ*, as it is daily practiced and adjudged before the Court of Holland.

Thus advised in the Hague, 10th July, 1645.

(Signed) B. VAN LEEUWEN,
ADRIAN VAN STRYEN,
C. VAN RAVESTEIN.

LIESCHING, TRUSTEE OF BUCHENRODER, v. CUYLER.

[6th March, 1832.]

Pleading.—*Exception against mere form of Pleading,—whether Replication allowed.*

Liesching,
Trustee of
Buchenroder,
v.
Cuyler.

In this case, the plaintiff had excepted to the defendant's plea for uncertainty.

To this exception the defendant had replied, and the plaintiff had rejoined.

* Cons. Leyser Med. ad Pand. Spec. 514, n. 2.—[Ed.]

The Court sustained the exception, with costs of exception, but not of the rejoinder, and ordered the defendant to re-plead.

Liesching,
Trustee of
Buchenroder,
v.
Cuyler.

The Court expressed an opinion that, where exceptions were taken merely to the form of the pleadings, no replication or subsequent pleading should be filed.

BRINK v. VAN DER RIET.

[13th March, 1832.]

Surety.—Whether liable after Rehabilitation to Co-surety.

Van Lier was creditor in a bond for £75, granted by H. van Ryneveld, as principal, and by Maynier and Van der Riet, as co-sureties and joint principal debtors.

Brink
v.
Van der Riet.

In 1827, Van der Riet's estate was administered as insolvent by the Sequestrator. Van Lier lodged his claim on Van der Riet's estate with the Sequestrator, in virtue of the said bond, but nothing was awarded to him out of said estate.

In February, 1829, the liquidation account of Van der Riet's estate was confirmed by the Court.

On the 13th September, 1831, Van der Riet obtained an act of rehabilitation in due form.

On the 10th June, 1828, Van Lier obtained a provisional sentence against Ryneveld and Maynier, on the bond.

Sometime between the 10th June, 1828, and — July, 1831, on which day Maynier received cession of the bond from Van Lier, Maynier paid the whole amount of the bond to Van Lier.

Maynier assigned his right to Brink, who this day claimed a provisional sentence against Van der Riet for £37 10s., being half the amount of the bond, founding his claim on the right given by common law to a co-surety, who has paid the whole amount of the surety debt, to be repaid *pro rata* by his co-surety; and referring to the bond, and the cession of the bond by Van Lier to Maynier, only as evidence that the latter had paid the whole amount of the bond to Van Lier, and that Van der Riet had been a co-surety in the bond.

Van der Riet, in defence against this claim, pleaded his act of rehabilitation.

The Court unanimously *refused* the provisional claim, on the ground that, if Maynier had paid the bond at any time before the confirmation of the liquidation of the estate of Van der Riet, he was, after such payment, a creditor, who might and ought to have claimed on Van der Riet's insolvent estate,

Brace
Van der Kiet

and was, therefore, was barred by the act of rehabilitation and that the plaintiff had produced no evidence to show that such payment had not been actually made by him before the said confirmation.

The Court abstained from giving any judgment on any other point raised in the case, but appeared to be unanimous in opinion that the principal creditor, having actually claimed on Van der Kiet's insolvent estate in respect of this bond neither he, nor any one deriving right to the bond from him, could, after Van der Kiet's act of rehabilitation, make any claim against Van der Kiet in respect of such bond.*

SMITH v. DAVID.

[13th March, 1832.]

Arrest,—sued out by a Person not being an Attorney, irregular.

Charter (1828), § 24, and Rules of Court 8 and 9 applied.

Smith
"
David.

In this case, Menzies, J., and Burton, J., held that, even if it had been competent, which it was not, for a plaintiff himself to sue out of the Supreme Court its process of arrest under rule 8, without the intervention of an attorney, that in this case the process had actually been sued out, not by the plaintiff, but for the plaintiff, by one Maynard, who was not an attorney of the Supreme Court, and that by the 24th section of the Charter such a proceeding was incompetent, and therefore that this alone would have been a sufficient ground for setting aside the arrest.

The other Judges gave no opinion on this point.

But Cloete moved to set aside for irregularity the arrest of Smith, on a writ issued at the instance of David, and the proceedings thereon.

1st. Because the process had been sued out by David through the medium of one Maynard, who was not an attorney, instead of by an attorney of the Court, as required by rules 8 and 9.

2dly. That the affidavit, in respect of which the process was issued, did not contain any description of the person or place of abode of the party who made it, contrary to rule 8.

3dly. That this affidavit was sworn by one Reid, who was neither the agent nor servant of the plaintiff, as required by rule 8.

* *Cons. Decis. Court of Justice in re Van Dyk v Tredoux*, August, 1821, and *Day v. Taylor*, 13th May, 1824.—[Ed.]

4thly. That this affidavit did not set forth that the sum of £15, alleged to be due to the plaintiff, remained wholly unsecured to the plaintiff, contrary to rule 8.

Smith
v.
David.

The Attorney-General, *contra*, maintained that all those objections were ill-founded.

The Court sustained the first objection, and therefore set aside the arrest, and the proceedings thereon, with costs.

The Court held that the fourth objection was not applicable in this case.

No evidence was laid before the Court, whether Reid was truly the servant of the plaintiff or not, and it was unnecessary to inquire into that fact, as the arrest was set aside on other grounds.

Menzies, J., and Burton, J., held that the second objection was good, and that the arrest ought to be set aside on that ground. No opinion on this point was expressed by the other Judges.

MEYER v. SCHONNBERG.

[15th March, 1832.]

Surety.—*Whether a Surety indemnitatis, having paid the Debt, can, without Cession of Action, maintain a claim of Damages against the Sequestrator, for negligence in executing the Sentence against a preceding ordinary Surety.*

G. F. Geyer was indebted to J. G. Muller in a bond, dated 7th December, 1821, for £7000, containing a second special mortgage over a certain house, and with Tredoux, Biel, and J. F. Meyer, as personal sureties.

Meyer
v.
Schonnberg.

On the 7th December, 1821, De van Reenen, by a separate bond, bound himself, with the three abovementioned sureties, as surety and co-principal debtor, for the payment of the said £7000.

On the same day, the plaintiff, G. H. Meyer, by a separate bond, bound himself to Muller that, "in case there should still happen to arise any loss or deficiency on the said bond, after the excussion of the aforesaid hypothecation and four personal sureties, then, and in that case, to be liable to pay any such deficiency to the lawful holder of the bond aforesaid."

Between the 15th November, 1824, and the 9th October, 1827, Muller duly excussed the principal debtor, Geyer, the special mortgage, and the sureties J. F. Meyer, Tredoux, and Biel, without succeeding in recovering payment from any of them for any part of his debt.

Meyer
v.
Schonnberg.

On the 26th April, 1827, Muller recovered judgment on the said bond against the surety Van Reenen, and on the 16th June, 1827, lodged it for execution with the defendant, as Sequestrator, who, on the 9th October, made a return that Van Reenen had appeared before him on the 17th September, and had declared that he possessed no property but what was mortgaged for more than its value.

In June, 1828, Muller sued the plaintiff, G. H. Meyer, on his bond, as the last and conditional surety, and the case having been referred to arbitrators, the plaintiff, in respect of their award, which was made a rule of Court on the 12th October, 1830, paid Muller the amount of the bond, with interest.

The plaintiff now brought this action against the defendant, on the ground that, by his negligence or improper management with respect to the judgment recovered by Muller against Van Reenen, he, the plaintiff, had been damnified to the amount of £268 19s. 6d.

His declaration set forth that Van Reenen, after having on the 17th September, 1827, declared to the defendant, as Sequestrator, that he possessed no property, had, on the 27th of the same month, surrendered his whole estate to the Sequestrator as insolvent, which surrender was notified by the defendant, as Sequestrator, in the *Gazette* of that month. That on the 5th October, 1827, the defendant, as Sequestrator, again gave notification in the *Government Gazette*, to the following effect:—

“That whereas the sentences at present filed for enforcement against D. van Reenen had now been secured to the satisfaction of his creditors, and he having withdrawn his letter, placing his estate under sequestration, it is hereby notified that said estate is hereby released from sequestration.”

That notwithstanding this public notice and the fact that three other creditors, who also had sentences for execution against the said Van Reenen in the defendant's hands, as Sequestrator at that time, were practically secured and satisfied, yet the plaintiff, when he called on the defendant, as Sequestrator for that purpose, on the 9th October, 1827, could obtain nothing else on his judgment from the Sequestrator except the return of *nulla bona*, above specified; by means of which several acts and omissions of the defendant, as Sequestrator, the plaintiff has been injured and damnified to an amount of £268 19s. 6d.

The defendant, in his plea, admitted all the above facts, but maintained that the plaintiff had no legal claim against him, because it was the duty of the plaintiff, on or after the said 27th of September, when Van Reenen declared to possess no property, to point out to the said defendant any property which he alleged to belong to the said Van Reenen, and to

indemnify the defendant for seizing the same, which he never did, and because the plaintiff hath sustained no damage by the several matters charged against the defendant as omissions of duty.

Meyer
v.
Schonnberg.

After evidence had been led at the trial, the Attorney-General, for the defendant, moved for an absolution from the instance, on the ground that the plaintiff had failed to prove that he had obtained any *cessio actionis* from Muller, against whom alone the injury, if any, had been committed by the defendant.

The argument on this point was postponed.

Postea.—Cloete argued, on the part of the plaintiff, that he had a right to maintain his present claim for reparation, although he had not obtained cession of his claim for reparation from the party against whom the alleged injury was committed, and quoted Voet 2: 14, § 14; 46: 1, § 27, 28; Van der Linden, Inst., b. 1, c. 15, sect. 14, p. 245; Pothier on Contracts, § 440.

The Attorney-General replied.

The Court absolved the defendant from the instance, with costs, on the ground that the plaintiff could not maintain the action, without a cession from Muller of the claim which had accrued to him from the alleged failure on the part of the Sequestrator to take the proper steps for the execution of the sentences lodged by Muller.

ORPHAN CHAMBER, *N. O. BOHMER v. THE REV. RUSH-
TON AND WAGNER, AS PASTORS AND MANAGERS
OF THE ROMAN CATHOLIC CHAPEL.*

[16th March, 1832.]

1. *Church.—Pastor and Managers of—are not, merely as such' liable for the expenses laid out by a third person in building a Chapel, on Land granted for the purpose of a Chapel being erected thereon for the use of the Congregation.*
2. *The grantee of such Land so granted, being absent from the Colony, is entitled to be represented by Curators, to take charge of the real Property.*
3. *Grantee of said Land, or his Curators, cannot deprive the Pastor and Congregation of the use and possession of said Chapel.*

1. This action was brought by the plaintiffs, as administering the estate of the deceased Bohmer.

The declaration set forth that, during the years 1822, 1823, 1824, and 1825, the late J. W. Bohmer having

Orphan
Chamber, N.O.
v. Pastors and
Managers
R. C. Chapel.

Orphan
Chamber, N.O.
v.
Pastors and
Managers
K. C. Chapel.

undertaken to build the Roman Catholic chapel in this town for the Roman Catholic congregation, received sundry moneys from the Rev. S. Scully, then one of the pastors, and from the then churchwardens of the said Roman Catholic community, for said purpose, amounting together to the sum of Rds. 8216 3sk. 4st., and which aforesaid pastor and churchwardens were then the managers of the affairs of the Roman Catholic chapel and its community; and the plaintiffs further say that the said late J. W. Bohmer did build, or cause to be built under his superintendence, the said Roman Catholic chapel, and for that purpose did make payments to the amount of Rds. 14,794 1sk., leaving a balance in his favour of Rds. 6577 5sk. 2st., as appears from an account-current, which had, on the 1st May, 1825, been examined and found to be correct by F. de Lettre, A. Chiappini, F. Mabile, M. Donough, and J. Heinrich, then members of the committee of the Roman Catholic community and managers of their affairs.

The plaintiffs, in their aforesaid capacity, therefore pray that the defendants, in their aforesaid capacity, may be condemned to pay the said sum of Rds. 6577 5sk. 2st., with the interest thereon *a tempore moræ*, the said plaintiffs, &c., being also willing to accept, in full payment of their claim now made, a bond under mortgage of the said Roman Catholic chapel, and payable under such conditions as the said defendants, as pastors, &c., may be able to prove to have been stipulated or agreed to by J. W. Bohmer, and the plaintiffs also pray, &c., costs.

In the plea, the defendants admitted that they are the pastors of the congregation attending the Roman Catholic chapel in the said declaration mentioned, but they deny it to be true that they now are or ever were managers of the affairs of the said Roman Catholic chapel and the community thereof, or of one or other of them, and these defendants are ignorant of the other matters and things in the said declaration, and therefore deny the truth thereof, and pray that this suit may be dismissed, with costs.

The plaintiffs, *inter alia*, put in evidence a deed of transfer, passed by the Commission of the Burgher Senate, on the 7th September, 1821, at the Colonial Office, conveying in full and free property to the Rev. Mr. Scully, of the Roman Catholic congregation of this place, a certain piece of land for the building of a church and parsonage, and acknowledging the Burgher Senate to be dispossessed of said land, and that the said Mr. Scully, for the purpose as aforesaid, now is, and henceforth shall be, entitled thereto.

A bond, passed by Scully in favour of the Lombard Bank, dated 23d (or 10th) March, 1823, hypothecating the piece of ground, on which a church has now been erected, and which was transferred to him on 7th September, 1821, by the Burgher Senate.

Also a bond, passed by Mabile and Bohmer, duly qualified by the churchwardens of the Roman Catholic congregation, dated 19th April, 1826, in favour of ———, for £375, hypothecating a certain piece of ground ceded to Scully for erecting a Roman Catholic chapel and parsonage, as per deed of transfer, dated 7th September, 1821.

Orphan
Chamber, N.O.
v.
Pastors and
Managers
R. C. Chapel.

After hearing counsel for both parties, the Court gave judgment for the defendants, with costs, on the following grounds:

That, admitting that Bohmer had advanced the sum of Rds. 6577 beneficially, for the erection of the chapel, which there was no reason to doubt, and that the defendants were pastors of the Roman Catholic congregation (which they did not deny) or even the managers of the affairs of the said congregation (which however was not clearly proved), still, that their character of pastors inferred no liability on them in respect of the present claim, and as little did their character of managers do so, because there was no evidence or ground in law, upon which the Roman Catholic congregation or any of the funds of that congregation, could be made liable for the expenses laid out by Bohmer, in building the chapel, and because there was no evidence that the defendants, either as pastors or managers, were in possession of any funds whatever, which were liable for the payment of Bohmer's claim; and because the title in the land was proved to be vested in Scully, and that the defendants had no title whatever which could enable them to grant any bond, by which the Roman Catholic chapel, or the ground on which it was built, could be legally hypothecated.

2. *Postea*.—The Attorney-General, for Donough and Chiappini, on behalf of themselves and the other sureties in the aforesaid bond, passed by Scully, of the 23d (or 10th) March, 1823, applied to have curators appointed to take charge of the real property mortgaged by Scully in the said bond, in favour of the Lombard Bank, and that it should be referred to the Master to report as to proper persons.

Donough
and Others
v.
Rushton
and Others.
21st June,
1832.

Thereafter, the Master having reported that Donough and Chiappini were proper persons to be so appointed curators, the Court confirmed the report and made the order, as prayed.

28th June,
1832.

Postea.—The Court refused to recall, at the instance of Rushton and the Roman Catholic congregation, the above appointment of Donough and Chiappini as curators of the immoveable property of Scully, on the ground that the said mortgage bond of the 23d (or 10th) March, 1823, had now been paid up and discharged.

31st Dec.,
1833.

3. In the same matter, the said last-mentioned plaintiffs brought an action against the same defendants to dispossess the latter from the use and occupation of the said chapel.

27th Dec.,
1833.

Donough
and Others
v.
Rushton
and Others.

The declaration set forth, that by a certain deed or instrument, in writing, dated 7th September, 1821, and made and executed by J. C. Horak and J. van der Poel, they, the said J. C. Horak and J. van der Poel, acting for and on behalf of the Burgher Senate of this colony, did cede and transfer, in full and free property to P. Scully, a certain piece of land (in the said deed particularly described) for the building of a church and parsonage. And the said plaintiffs say that a church and parsonage were afterwards built thereon, and that, on or about the 10th March, 1823, the said land and premises were mortgaged for a certain sum of money, and the said plaintiffs were, by order of this Court, bearing date 10th July, 1832, appointed curators of the aforesaid real property. And the said plaintiffs say that the defendant hath entered into and upon the said real property, and the said plaintiffs have often requested him peaceably to deliver up the possession thereof to them, but to do this the defendant hath refused, and still doth refuse. Wherefore, &c., &c.

The defendant's plea:—The defendant admits the transfer of the property to P. Scully, the building of a church and parsonage, the mortgage of the property, and the appointment of the plaintiffs as curators, as in the declaration mentioned; but the said defendant denies all and every other allegation contained in the said declaration, and tenders issue thereon with the said plaintiffs.

And the said defendant, for a further plea, saith that, by the rules and regulations of the Roman Catholic community, the charge and possession of the Roman Catholic church, constructed upon the ground granted for that purpose to the said Scully, mentioned in the declaration, is vested in churchwardens of the said congregation, and that the said defendant is the pastor of the said congregation, duly appointed thereto by the Government of this colony, and that, in terms of the grant made to the said Scully, the said piece of ground was granted for the erection of a church, and that the said church so constructed thereon is solely and exclusively used by the said defendant as the pastor, and the churchwardens of the said congregation for the exercise of their religion, and that the said plaintiffs are not, at law, entitled to hinder or obstruct the said defendant in the use thereof as aforesaid.

The plaintiffs called—

Julia Macalister.—"I am housekeeper to the defendant. He lives in the house adjoining the Roman Catholic chapel. He has lived there six or seven years. There was an entrance from this house into the chapel, but the defendant has stopped it up. There are no keys to the chapel. The doors are fastened by bolts inside. I do this without any directions, because I keep the chapel clean. There are still two entrances from the

house into the chapel. I enter the chapel from the house. There has never been, since I have been in the colony, any other Roman Catholic place of worship than this chapel, since the chapel was built. I have been in the colony for 15 years. There is divine service performed there regularly every day and night."

Donough
and Others
v.
Rushton
and Others.

The plaintiffs closed their case.

The defendant maintained that the evidence adduced by the plaintiffs, so far from establishing their claim, completely established the defendant's defence against the claim.

The defendant absolved from the instance, with costs.

The Court held that, although the plaintiffs are in the same situation as Scully, and that the title to the land on which the church and parsonage have been erected is in Scully, and that he has as much right to turn the defendant out of the possession of the premises built on his land, as he would have had to have turned him out of possession of the land before the premises had been erected, and that the action was brought in the proper form for trying Scully's title to the property and possession of the land and premises, still, that as the deed by which the Burgher Senate granted the land to Scully, and, which was his title in this action, according to what appears to be its true construction, granted the land to him under the express condition and for the purpose of a chapel and parsonage being erected thereon, for the use of the Roman Catholic congregation of Cape Town and their pastor,—and as the defendant was the pastor appointed by Government to the Roman Catholic congregation of Cape Town,—and as it was proved that there was no other Roman Catholic congregation in Cape Town, except that of which the defendant was pastor, the plaintiffs could not deprive the defendant and the said congregation of the use and possession of the chapel and parsonage, without a violation of the express condition under which he held his title to the land and premises; consequently, that he had no right to turn him out of the possession, and could not maintain the present action.

THE KING v. VIPOND.

[20th March, 1832.]

Review from Magistrate's Court,—although refused on the only ground alleged, and not found sufficient by the Court, yet, "ex officio judicis," set aside on another ground.

The defendant in this case had been prosecuted in the Court of the Resident Magistrate for Cape Town, for having

The King
v. Vipond.

The King
v.
Vipond.

contravened Ordinance No. 54 § 8, on a charge or complaint which set forth as follows:—

“Daniel Cloete, Esq., clerk of the peace, &c., states that Richard Vipond, &c., dealer in malt liquors, by retail, is guilty of contravening Ordinance No. 54, &c., in that, upon or about the 20th day of January, 1832, and at the dwelling house of the said R. Vipond, situate near Wynberg, in the Cape district, the said R. Vipond did wrongfully and unlawfully sell, or by his servants, to the prosecutor unknown, cause and suffer to be sold, wine by retail, contrary to the 8th section of the aforesaid Ordinance. Wherefore upon due proof and conviction thereof,” &c., &c., &c.

On the above charge, the Court of the Resident Magistrate convicted the defendant in the statutory penalty of £150, but the proceedings having been brought by review before the Supreme Court,

The Court refused to review the proceedings on the only ground alleged, that the defendant could prove that the witness on whose testimony he had been convicted was unworthy of credit, and could not be believed on oath.

But the Court set aside the conviction, on the ground that the charge was irregular and informal, in so far as it did not sufficiently state and set forth the crime or offence charged, inasmuch as it did not state the name of the person to whom the defendant was accused of having sold the wine.

BRINK AND OTHERS, EXECUTORS OF VAN DER BYL,
v. MEYER.

[23rd March, 1832.]

“*Donatio.*”—Whether “*Remuneratoria, inter vivos,*” or “*mortis causa.*”

“*Remuneratoria.*”—Whether Registration or Execution before Notary required to make it valid.

Brink and
Others,
Executors of
Van der Byl,
v.
Meyer.

This case resolved into an accounting between the plaintiffs and the defendant, under the form of a claim in convention at the instance of the plaintiffs against the defendant, and a claim in reconvention at the instance of the defendant against the plaintiffs.

One of the items of the defendant's claim in reconvention was the following document, the body of which was admitted by the defendant to be in his handwriting, and which, after examination of several witnesses, was ultimately admitted by the plaintiffs to bear the genuine signature of the deceased Van der Byl:—

"Whereas my cousin, Gerrit Hendrik Meyer, Nicolas' son, has, since the year 1803, conducted my different concerns as my agent, with this result, that I do hereby openly acknowledge that I owe a great part of my fortune to his zeal and faithful administration, without his ever having received more than Rds. 25 per annum, for the manifold trouble and sacrifice of time devoted to it, and which I must acknowledge to be by no means adequate to his services,—I, the undersigned, Pieter Gerhard van der Byl, have therefore resolved to bespeak to him, or to his heirs, in the case of his predecease, a sum of Rds. 15,000, or 45,000 guilders, India valuation, which sum of Rds. 15,000 I hereby appoint and expressly desire that it shall be paid by my executors or heirs, as a legal debt, directly after my demise, out of my estate, to the said Meyer or his heirs; to serve as an equivalent for the amount of 2½ per cent., which he otherwise would have had a right to charge me, with my consent, in the yearly settlement of my accounts.

Brink and
Others,
Executors of
Van der Byl,
v.
Meyer.

"In witness whereof, and for the confirmation of what has been before stated, I have signed these presents with my usual signature.

"At Cape Town, Cape of Good Hope,
on the 24th day of February, 1827.

(Signed) "P. G. VAN DER BYL."

Cloete, for the plaintiffs, maintained that this deed is to be considered as constituting *donatio mortis causa*, that the validity or invalidity of deeds, constituting *donationes mortis causa*, is to be decided according to the same rules, which apply to the validity or invalidity of bequests in wills and of legacies, and therefore, that as the deed, by which this donation to the defendant is constituted, is written wholly in his own hand, it is on that account null; (*vide* Voet 34: 8, 3; 39: 5, 3, and 39: 6, 4; Bynkershoek Quæst. Jur. Privat., 3: c. 5, p. 396, *et* c. 8, pp. 426, 428, 429;) and that if this deed is not to be considered as a *donatio mortis causa*, it must be considered as *donatio inter vivos*, to the validity of which registration was an essential requisite, as it exceeded *quingenti aureos* in amount, and that this deed had not been registered, nor executed before a notary and witnesses, and quoted Voet 39: 5, 15, 17, 18.

The Attorney-General, *contra*, maintained that this deed of 24th February, 1827, was not a deed of donation *mortis causa*, but a deed of permutation, or *donatio impropria vel remuneratoria*. (Westenberg Principia Juris, sec. Pand. l. 39, tit. 5, §§ 18, 26, and 27; Sande, Decisiones Frisicæ, lib. 5, tit. 1, def. 3, *in med.* "cum ergo," p. 632; Leyser Meditationes ad Pandectas Specimen 436 per tot.; Perezius

Brink and Others,
Executors of
Van der Byl,
v.
Meyer.

ad Cod. 8 : 54, 34 ; Grotius Inleid., b. 3, pars. 2, § 3, ibiq. Schor. in not. ; Huber in Jus. Hod., b. 3, c. 14, §§ 4-6 ; Nassau la Leck Bered. Reg. in voce "*Donatio*," p. 164 ; Codex Batavus, p. 225 ; Voet, passim, and 39 : tit. 5, § 18 ; et 22 : tit. 4, § 11.)

The Court held (on the authority of Voet 39 : 5, 3 ; 39 : 6, 1, 2, 3), 1st, that the deed in question does not constitute a *donatio mortis causa* ; and 2dly, that it does not constitute a simple *donatio inter vivos*, but a *donatio remuneratoria*, and on the authority of Voet 39 : 5, 15, 17, 18, held that, as a *donatio remuneratoria*, this deed is valid, and must have effect given to it, although neither registered nor executed before a notary and witnesses, and, therefore, in the settlement of accounts between the parties, credit was given to the defendant for the sum of Rds. 15,000, mentioned in this deed.

IN RE WOEKE.

CLOETE v. THE COLONIAL GOVERNMENT.

[27th March, 1832.]

"*Pignus Mobilium*."—"Prætorium," by attachment is equivalent to Tradition, and is preferent to "*Tacitum vel Legale*" of prior date, but without Tradition.

In Re Woeke,
Cloete
v.
The Colonial
Government.

Cloete moved to make absolute a rule ordering the Colonial Government to show cause why the distribution in the insolvent estate of Woeke should not be amended, in so far as preference has been therein granted to the Colonial Government on the proceeds of 15 stukvats, which were returned on the 24th July, 1827, as security for a certain sentence obtained in the late Court of Civil and Criminal Justice by L. J. Mosterd, on the 5th July, 1827, and ceded to L. J. Mosterd ; and, in support of the rule, quoted Van der Linden's Inst., b. 1, c. 12, sec. 2, p. 173, and maintained that his *pignus prætorium* was preferable to the tacit hypothec of Government, in respect that the latter had never been perfected by possession. He admitted that the Government had a tacit or legal hypothec from the 1st January, 1826, while the attachment was laid on the property in question on the 24th July, 1827, and the estate sequestrated on the 21st August, 1827, and quoted Van Leeuwen, Cens. For., pt. I., b. 4, c. 11, § 7 ; Voet 20 : 4, 24.

The Attorney-General, *contra*, quoted Voet 20 : 2, 8 ; Van Leeuwen, Cens. For., pt. I., b. 4, c. 9, § 2 ; Sande's Dec. Fris., lib. 3, tit. 12, def. 1 ; Van der Keessel, Theses,

419, 420; Placaat, 22nd July, 1749, § 26, G. Plac. B., vol. 7, p. 1010; Van Leeuwen's Commentaries, b. 4, c. 13, pp. 357-360.

In Re Woeke.
Cloete
v.
The Colonial
Government.

The Court unanimously made the rule absolute, on the ground that a *pignus mobilium* completed by tradition is preferable to a prior tacit legal general hypothec, and that a *pignus praetorium*, constituted by attachment, is precisely in the same situation with a *pignus mobilium*, completed by tradition. (*Vide* Van der Byl v. the Sequestrator, 23rd September, 1828, *supra*, p. 318.)

BORRADAILE & Co., q.q. VAN REENEN, v. MULLER.

[29th March, 1832.]

Pœnal Stipulation.—*When maintained and the full amount as as agreed to by Contract, awarded.*

This action was brought by the plaintiffs, as the agents of Van Reenen.

Borradaile
& Co., q.q.
Van Reenen,
v.
Muller.

The declaration set forth that, by a contract, dated 8th November, 1827, and made between the said Van Reenen, on the one part, and the said defendant, he the said defendant, bound himself to undertake the direction of the brewery of the said Van Reenen, at his place named the "Brewery," and on such other places as the said Van Reenen should erect any other brewery, and also bound himself to instruct the said Van Reenen and his sons in the making of good malt beer, and to make Van Reenen acquainted with the secret of brewing malt beer of the best quality, and not to divulge this secret to anybody else, except to the sons of the said Van Reenen, and not to quit the service of the said Van Reenen, except on Sundays, or such other times as he shall have obtained consent thereto either from said Van Reenen or his wife; and the said defendant finally bound himself to perform his aforesaid engagements duly and strictly, on pain of forfeiting a sum of Rds. 5000, on behalf of the said Van Reenen or his heirs, by virtue of which contract the said defendant, on the 8th November, 1827, entered into the service of the said Van Reenen, and took upon himself the direction of the said brewery, and continued in such service and in the direction of the said brewery, under and by virtue of the said contract, from the said 8th November, 1827, until 1st June, 1831.

That the said defendant did, on the 1st May, 1831, notify, in writing, to the said Van Reenen, that he, the said defendant, would, on the 1st June then next, quit the service of the said

Borradaile
& Co., q.q.
Van Reenen,
v.
Muller.

Van Reenen, as overseer of the said Van Reenen's brewery, and although he, the said Van Reenen, did thereupon notify in writing to the said defendant, that he, the said defendant, could not legally quit the service of him, the said Van Reenen, without making himself liable to the payment of Rds. 5000, being the penalty fixed by the aforesaid contract, yet the said defendant did, on the 1st June last, unlawfully quit and absent himself from the service of the said Van Reenen, and hath from thence hitherto remained and continued absent from the service of the said Van Reenen, without having obtained the consent of him, the said Van Reenen, or his wife, and hath entered into the employment of another brewer in Cape Town, and conducts the business of his brewery, and hath not as yet instructed the sons of the said plaintiff in the making of good malt beer: and the said defendant hath thereby incurred the penalty of the sum of Rds. 5000.

The defendant, in his plea and claim in reconvention, admitted having executed the notarial contract set forth in the declaration, but alleged that he did faithfully perform the engagements required to be performed on his part and behalf in and by the said contract, and that he did instruct the said principal plaintiff, D. van Reenen, in the secret of brewing malt beer of the best sort, and that he was prevented from instructing his two sons mentioned in the said contract, by the acts of the said Van Reenen; and the said defendant further saith that, by the said contract of the 8th November, 1827, it was further stipulated by the said D. van Reenen that, so long as the said Van Reenen or his heirs should exercise the business of a brewer, and the said defendant have the direction thereof, that he, the said Van Reenen, would pay to the said defendant $1\frac{1}{2}$ rixdollar for each hogshead of beer brewed under the superintendence of said defendant, and sold or disposed of by the said Van Reenen, and that, for the strict fulfilment of the said engagement, the said Van Reenen, by and on his part and behalf, did bind himself in a penalty of Rds. 5000 for the benefit of the said defendant. That the said D. van Reenen hath totally failed to comply with his said engagement; that he became an insolvent on or about the 22d July, 1828, and by the surrender of his estate the aforesaid contract became, and was, *eo ipso*, annulled and void at law; and the said defendant further saith that the abovementioned brewery of the said Van Reenen was also publicly advertised and put up for sale in the insolvent estate of the said Van Reenen. That after the surrender of the estate of the said Van Reenen, the said defendant was solicited to take the charge of the said brewery, and that the said defendant did consent to take the superintendence thereof, and that he continued to hold that superintendence until the 1st June, 1831. That the said Van

Reenen still further failed to comply with the aforesaid contract, and to pay to the said defendant for his superintendence in the said brewery Rds. $1\frac{1}{2}$ for every hogshead of beer, but, on the contrary, that the said Van Reenen did sell and dispose of the beer brewed under the superintendence of the said defendant, but refused or neglected to pay the said defendant for the months of June, July, August, September, October, November, and December, 1827, and also for the months of April and May, 1831, and that the said Van Reenen thereby is actually indebted to the said defendant in a sum of Rds. 1477 4sk., which he unlawfully withholds from him, the said defendant.

Borradaile
& Co., q.q.
Van Reenen,
r.
Muller.

In their replication and plea in reconvention, the plaintiffs admitted that by the said contract such payments were to be made by the said Van Reenen to the said defendant, under such provisions, in such manner and under such penalty, as in the said plea is in that behalf mentioned; and that the said Van Reenen became insolvent, and the said brewery was advertised and put up for sale in such manner as in the said plea mentioned; and the said plaintiffs further say that they deny every other matter of fact and conclusion of law in the said plea contained.

And the said plaintiffs, for plea to the said claim in reconvention, alleged that at the time when the said defendant left the service of the said Van Reenen, there was justly due to him the sum of Rds. 418 6sk. for the months of April and May, 1831, which sum the said defendant did not demand of the said Van Reenen until after he had left his service, and which the said Van Reenen refused to pay, but offered and hereby offers to allow it, in deduction of the said penalty; and that, in the month of January, 1828, the said defendant and the said Van Reenen came to a settlement of accounts, and the said Van Reenen was found indebted to the said defendant in a certain sum, for which the said Van Reenen gave the said defendant his promissory note, which hath never been presented, and the amount of which, when ascertained, the said plaintiffs are ready and willing to allow, in deduction of the aforesaid penalty. Wherefore, &c.

Evidence was led by both parties, confirming the allegations in the pleadings, in the course of which it was proved that in March, 1828, the brewery utensils belonging to Van Reenen had been sold by the Sheriff, in execution of a writ, but that they had all been bought in for him by his friends.

That in July, 1828, Van Reenen surrendered his estate as insolvent, but that, although the brewery was put up for sale, it was not sold.

That, on the 24th August, 1829, he made a composition with his creditors, and was rehabilitated on the 24th September,

Borradaile
& Co., q.q.
Van Reenen,
r.
Muller.

1829, and that from the 1st July, 1829, until the trial, the plaintiffs, who guaranteed the composition, received all the proceeds of the brewery, and paid all the expenses. That the brewery had not stopped working for a single day, in consequence either of the execution by the Sheriff, or of Van Reenen's surrender, and that after July, 1829, more beer was brewed and sold than formerly.

That from July, 1829, until the defendant left the brewery, the invariable mode of payment of the defendant's allowance was, that at intervals not less than a month he presented his account to Van Reenen, who approved and signed it, or gave an order for the amount on the plaintiffs.

That Van Reenen did, in May, sign the defendant's account for April, when presented to him, but that the defendant did not present it or the account for May to the plaintiffs for payment until in June, after he had left Van Reenen's service.

That Deneys, on the management of whose brewery the defendant entered on leaving Van Reenen's service, in consequence of a contract entered into between Deneys and the defendant, on 5th May, 1831, gave the defendant Rds. 3000 per annum, and found him a house, besides 4 or 5 lbs. of meat a-day, and as much beer as he could drink, and had guaranteed him against any loss he might sustain by being condemned to pay the penalty of Rds. 5000, now sued for.

The Attorney-General maintained that the insolvency of Van Reenen did not put an end to the contract, and quoted Bell's Bankrupt Law, vol. 1, p. 367; vol. 2, 442; Archbold on Bankruptcy, p. 134.

That the non-payment of the defendant's accounts for the months in 1827, previous to 8th November, 1827, the date of the contract, could not be founded on as breaches of the contract.

That Deneys' guarantee to the defendant against the plaintiff's claim for the penalty was a proof that the value of the defendant's services was equal to the amount of the penalty, which therefore was not greater than the damage the plaintiffs have sustained by their loss of the defendant's services, and quoted Bynkershoek, Quæst. Jur. Privat., lib. 2, c. 14, p. 332.

Cloete, for the defendant, maintained that no specific period having been stipulated for the endurance of the contract, it might be put an end to by either party on giving notice. But the competency of the defendant's now maintaining this defence, which he had not stated in his plea, having been questioned by Menzies, J., and Burton, J., he passed from this defence, and maintained, 1st, that the contract was put an end to by the insolvency of Van Reenen, because, by the contract, Van Reenen bound himself to perform his share of it under a penalty of Rds. 5000, which his insolvency disabled

him from being in a situation of paying, if he failed in performance, and because Van Reenen's insolvency, surrender, and rehabilitation would have barred the defendant from suing Van Reenen for performance of the contract, or for the penalty in case he failed to do so; consequently, as these events would have put an end to the contract on one side, they must necessarily put an end to it on the other side.

Borradaile
& Co., q.q.
Van Reenen,
v.
Muller.

2dly. That any arrangement under which the defendant continued at the brewery after the insolvency was a new engagement, tacitly entered into, and that the defendant, by continuing his services in terms of the contract, did not waive his right to maintain that it had been put an end to by the insolvency.

3dly. That the non-payment of the Rds. 422, accounts for November and December, 1827, and of April and May, 1831, was a breach of the contract on the part of the plaintiff sufficient to entitle the defendant to refuse farther performance of the contract on his part; and maintained that, by the words of the contract, Van Reenen was bound to pay the defendant the 1½ rixdollar, *at the time each hogshead was sent out of the brewery*, and that Van Reenen was *in mora* for that amount for each hogshead, from the moment it left the brewery, and that this was a breach of the contract. Van Leeuwen, Cens. For., pars II., lib. 1, c. 26, § 23 *in medio*.

4thly. That even although the defendant had improperly broken the contract, still that the amount of the penalty sued for was far beyond the amount of any damages which had been thereby occasioned to the plaintiff, and that the penalty of Rds. 5000 was a *maximum* penalty, stipulated for a breach of *all* the stipulations in the contract, and therefore could not be enforced to the full amount, unless *all* the stipulations in the contract had been proved to have been broken by the defendant, which had not been done, no evidence having been adduced to show that the defendant had *divulged* the secret. Pothier on Contracts, § 345; Bynkershoek *in loc.*, cit. by Attorney-General; Voet 45: 1, 13; and quoted Stedman *v. Curlewis*, 15th December, 1829, *supra* p. 416.

[*Cur. Adv. Vult.*]

The Court, by a majority (Chief Justice *dissentiente*, and Kekewich, J., absent on circuit), *held* that the defendant on the 1st June, 1831, quitted the service of Van Reenen against the consent of the latter. That it was proved that the defendant has not instructed Van Reenen's sons in the art of making good beer; that the true meaning of the contract was that the defendant should instruct Van Reenen's sons when they should attain that age at which it was suitable and convenient that they should engage in business as brewers, and

defendant remained three years and five months, viz., from January, 1828, till June, 1831, in the service of Van Reenen, and regularly received the sums due for the different months of that period, without making any complaint on account of the non-payment of the sums due for November and December, 1827, until after he had engaged himself to Deneys, and resolved on quitting Van Reenen.

Borradail
& Co., q.q.
Van Reenen,
v.
Muller.

That it was proved that, if the account for April, 1831, had been presented to the plaintiffs for payment before the defendant had deserted Van Reenen's service it would have been paid, but that it was not presented until he had broken the contract by quitting Van Reenen's service. That the plaintiffs have done enough by offering in their declaration to allow the amounts for April and May, 1831, as a set-off *pro tanto* for the penalty forfeited to them by the defendant. That on these grounds the defendant has forfeited the whole penalty of Rds. 5000 stipulated in the bond. Although it is true that the plaintiffs have not proved, or even alleged, that the defendant has failed to perform two other of the stipulations in the contract, namely, by not having revealed the secret of how to brew the best beer to Van Reenen, or by having revealed it to any one else, that it is not the law of this colony that, where a contract contains several stipulations, and provides a penalty for non-performance, the amount of the penalty is to be divided by the number of the stipulations, and the quotient to be considered as the penalty stipulated for the breach of each condition.

That, on the authority of Bynkershoek, book 2, c. 14, the defendant having failed to perform some of the stipulations in the contract, the plaintiffs are entitled to recover the whole penalty stipulated in the bond, unless it shall appear to the Court that the penalty *longe et late excedat id, quod stipulatoris interest*; that the facts proved in this case establish that the amount of the penalty stipulated does not exceed the amount of the interest which Van Reenen had in the performance, by the defendant, of those stipulations in the contract which the defendant has failed to perform.

That not only did the defendant desert the plaintiff's service, but he has transferred his services to a rival establishment in the same trade. That a very considerable decrease in the amount of Van Reenen's sales of beer is proved to have taken place immediately after the defendant left his service, and that this decrease has not been proved to be altogether attributable to any other cause.

That the remuneration which Deneys has agreed to give the defendant is a fair criterion of the value of the defendant's services. That he pays the defendant at least Rds. 500 a-year more than Van Reenen did, and in order to secure his services

Borradaile
& Co., q.q.
Van Reenen,
v.
Muller.

has stipulated to pay, if required, the very sum which the plaintiffs claim as the amount of the loss occasioned to them by the want of those services.

On these grounds, the majority of the Court held that the plaintiffs should have judgment for Rds. 5000, and costs, allowing the defendant, in part payment of that sum, to give the plaintiffs receipts for the sums due to him by the plaintiffs for the year 1827 and for the months of April and May, 1831.

Chief Justice dissented from the above opinion, *in omnibus*.

Judgment was given for the plaintiff, for Rds. 5000, and costs, under deduction of Rds. 1478 2sk., and the interest thereon, *a tempore moræ*.

NISBET & DICKSON v. RICHARDSON.

[8th May, 1832.]

Arrest, Personal—Civil.—When it cannot be executed in Dwelling-house or Precincts.

Nisbet &
Dickson
v.
Richardson.

The Attorney-General stated that Richardson, having been duly arrested by the Sheriff, had been rescued by force immediately thereafter, and that, although he had not assisted the persons by whom the force was used, he had, immediately on being rescued, entered his dwelling-house and continued to abide therein; and produced the Sheriff's return on the writ, viz.,—"I have taken the defendant on the 7th day of April last, near his dwelling-place, in the district of George, and he was rescued by force immediately thereafter.

"30th April, 1832."

The Attorney-General also produced the affidavits of Thomas Johnston, Adam Tamboer, Cobus Magerman, and Barend Swart, and quoted *ff.* 2, 4, *l.* 18, 19, 20, 21, 22; Peckius van Arresten, by Van Leeuwen, *L.* 28, p. 377, *ibiq. nota* of Van Leeuwen; and moved for a writ of attachment against Richardson, and also for a rule against Richardson, to show cause why the same should not be executed on the person of Richardson, within his dwelling-house, or wheresoever he shall be found.

Writ directed, and rule to show cause on 5th June granted.

7th June,
1832.

Postea.—Cloete, for Richardson, showed cause against the rule, and maintained,

1st. That no writ for the attachment of the person in execution of a civil judgment can, by law, be executed within the dwelling-house of the party, and quoted *ff.* 50, 17, *l.* 103; *ff.* 2, 4, *l.* 18, 19, 21; and the Ordinance of King Philip, 1570,

ibiq. art. 61, and notes of Van Leeuwen; Peckius de Jure Sistendi, c. 6, § 3: and Idem van Arresten by Van Leeuwen, in nota ad c. 6, § 3; Van Alphen's Papegay, vol. I. c. 31, p. 488 and 489; Merula, l. 4, tit. 24, c. 9, n. 6, p. 353; Van Leeuwen's Comment., 5: 26, 20; Vromans de Foro Competenti, b. 3, c. 4.

Nisbet &
Dickson
v.
Richardson.

2dly. That this was true, even although the defendant had formerly been legally arrested, and had been forcibly rescued therefrom and escaped into his house.

3dly. He maintained that, admitting that the defendant had been apprehended and rescued as alleged, those facts were not sufficient to entitle the plaintiffs to have the rule made absolute for executing the writ of attachment on the person of the defendant within his dwelling-house, or wherever he may be found, because the alleged arrest was illegal in respect, first, that the apprehension took place in a fenced-in garden adjoining the dwelling-house of the defendant, and into which access is had from the dwelling-house; secondly, because the apprehension was made by persons not competent to make it, (Voet. 42: 1, § 44,) not having been lawfully appointed deputies of the Sheriff, and also because they had not exhibited to the defendant the writ or their authority.

The Attorney-General, in support of the rule, maintained the contrary of all these propositions, and that the authorities quoted did not apply to the apprehension of *the person in execution*, but only to that kind of arrest which was of the nature of mesne process, and quoted Blackstone, vol. 3, b. 3, c. 19; Huber, Prælect., b. 2, 4, § 5; Voet, lib. 42, 1, § 45; Van Leeuwen, Cens. For., pt. II., lib. 1, c. 33, § 25; Peckius, de Jure Sistendi, c. 6, § 7, 8; Van Alphen's Papegay, *ut supra*; Impey, p. 102; Bell's Comment., vol. 2, p. 552, edit. 1821.

[Cur. Adv. Vult.]

(Vide Voet 48, tit. 3, § 2.)

Postea.—The Court unanimously were of opinion, that no authority had been produced in support of the rule, while, on the contrary, many authorities, and particularly Voet 48, tit. 3, § 2, had been produced, which showed that no man can legally be taken from his dwelling-house (which includes certain of the premises connected with the house) in execution of any writ, except for recovery of debts due to the Fiscal, of a civil nature (*i.e.*, for any purpose connected merely with the administration of civil justice), and discharged the rule with costs.

10th July,
1832.

IN RE WOKE.

OSMOND AND SMITSDORFF v. THE WIDOW OF JACOB
VAN REENEN AND S. V. VAN REENEN.

[8th May, 1892.]

Preference—of Fisc on Property of Insolvent Pachter.

In Re Woeke.
Osmond and
Smitsdorff
v.
The Widow
J. van Reenen
and S. V. van
Reenen.

Cloete moved to have made absolute the rule *nisi*, which he had obtained, calling on the defendants, as sureties for Woeke and Raven, for the Government pacht of 1825 and 1826, to show cause why the distribution account in the insolvent joint estate shall not be opened, and why preference on the disposable assets, found in the estate, shall not be awarded to Government, in virtue of their claim for the debt due on the pacht of 1827, to and before the amount due on the arrears of the pacht of 1825 and 1826.

He stated that the said disposable assets, Rds. 11,253, were produced by the profits of the pacht of 1827, and quoted Voet 20: 2, 8, "*Sed quo Magis*," van Zurck.; Codex Batavus, p. 438, *voce* "*Gemeene middelen*," § 20.

The Attorney-General and De Wet, for the widow Van Reenen and S. V. van Reenen, showed cause against the rule, and maintained,

1st. That the passage in Voet 20: 2, 8, did not apply, and
2dly. That if it did, judgment had been recovered against Woeke and Raven, on the pacht obligation of 1826, in March, 1827, and therefore that the distribution account was framed in that manner, which was most consistent both with law and equity.

The Court, before deciding the questions of law arising in this case, ordered that the distribution account should be referred to the Master, to report thereon.

The Master reported, "that the Rds. 11,223 6sk. 1st. of disposable assets in this estate, were the proceeds of certain wine, beer, and spirits, which formed part of the estate when it was surrendered, and had been realised after the surrender, for the general benefit of the estate, by Osmond, who, on his own application, and by consent of all parties, had been appointed by the Sequestrator, receiver of the retail business of the pacht, which he was to carry on as such during the subsistence of the licence.

"That the pacht was payable by Woeke and Raven to Government by half-yearly instalments.

"That their first contract with Government for the pacht commenced in September, 1825, and ended on 31st December, 1826. That the second contract was entered into with the new sureties, Osmond and Smitsdorff, before the arrears for the old one for 1825 and 1826 had been paid. That on

the 29th March, 1827, His Majesty's Fiscal obtained a sentence against the insolvents for Rds. 16,294 2sk. 4st. of said arrears, which sentence was lodged for execution on the 11th April. The Sequestrator, in execution of this sentence, on the 27th July, took an *opgaaf* or return of property, made by Woeke, for himself and partner, Raven, to satisfy the amount which had been reduced by intermediate payments to Rds. 9060. On the 16th August following, the Fiscal obtained another sentence against the insolvents for £1221 5s., being the first instalment due on the pacht for 1827, no part of which had been paid. On the 21st of August, Woeke surrendered his estate. In distributing the proceeds of this estate, the Commissioner for the Sequestrator has awarded, in the first place, full payment to Government for Rds. 9691, being the arrears in the first pacht for 1825 and 1826, and has done so properly, for not only was a sentence obtained and an *opgaaf* taken for this amount, but the insolvents, on the 31st December, 1826, had sufficient stock in hand to pay this amount. At the commencement of the pacht for 1827, the stock remaining over from the old account, valued according to the retail prices at which the insolvents were then selling, was Rds. 18,000. The full amount of the Government claim, on account of the pacht for 1827, is Rds. 32,579 2sk. 4st., in payment of which there has been awarded to Government Rds. 15,229 2sk. 3st., thus leaving a deficiency of Rds. 17,350, for which the sureties, Osmond and Smitsdorff, are liable."

In Re Woeke.
Osmond and
Smitsdorff
v.
The Widow
J. van Reenen
and S. V. van
Reenen.

Postea.—This day, by consent, the report of the Master 12th January,
was confirmed. 1833.

IN RE DURR.

ORPHAN CHAMBER, q.q. MINOR HEIRS IN RE DURR,
v. VAN REENEN.

[22d May, 1832.]

Appeal to Privy Council ousts Supreme Court of further Jurisdiction.

Supreme Court in above case cannot order Recovery of Payment on Bonds in custody of Registrar of the Court.

In this case in which an appeal to the Privy Council had been taken against the judgment of the late Court of Appeals, 18th September, 1823, and in which an order had been made on the 17th August, 1829, by His Majesty in Council, that the said judgment "be reversed and set aside; that the

In Re Durr.
Orphan
Chamber
q.q. Minor
Heirs in Re
Durr, v.
Van Reenen.

*In Re Debt
/ Cyprus
Case No.
No. 1000
Heirs of Re
Debt,
v.
The Bankers.*

documents relating to this cause be forwarded to the Right Hon^{ble} the Lords of the Committee of Council for hearing Appeals from the Plantations, and that the moneys paid into the hands of the Secretary of the Court of Appeals do remain in his hands until the final order of His Majesty in this appeal, and that all further directions be reserved until the further report of the Lords of the Committee of the Council."

The Court refused to make an order on the Registrar of the Court (who had come into the place of the Secretary of the Court of Appeals), to take measures for recovering payment of certain bonds, which, in virtue of the said order, were in his custody, on the ground that, as the cause had been removed to, and was now pending before the Privy Council, the Court had no jurisdiction so to do, even if the above order had not been made by His Majesty in Council, and *a fortiori* after it had been made.

RICHERT'S HEIRS v. STOLL AND RICHERT.

[7th June, 1852.]

Inheritance of Minor Grandchildren.—Father having died before Grandfather,—under what circumstances Compensation is allowed of Inheritance of Minor Grandchildren, with Debt of their Father due to Grandfather.

*Richert's
Heirs
v.
Stoll and
Richert.*

The declaration set forth,—Andries Richert made his last will in writing, dated 10th February, 1816, whereby he nominated and appointed, as his sole and universal heirs, his wife, the testatrix, together with the children procreated by him in his former marriage with G. C. Beukes, of whom one was his son, named Andreas, each for a share, one by one a head, in all what the testator shall leave behind at his death; and in case of predecease of one or more of the aforesaid heirs instituted by the testator—the predeceased's lawful descendants, by representation according to the laws of succession observed in this colony.

The said testator afterwards duly made and executed the following codicil:—

"Whereas my late third son, Andreas Richert, born from my first marriage, was one of my heirs in my aforewritten will, but was called away from this world by divine providence in 1829; and whereas, during his lifetime, I advanced to him, at different times, a sum of Rds. 6000 6 sk., to extricate him from his unfortunate circumstances, for which he passed a solemn engagement to myself and family, which was not only

exhibited before a notary and witnesses, but was also acknowledged by my executors and administrators to my estate, and embodied in the inventory thereof, to be *deducted from his inheritance in the event of my demise happening before his*, and becoming my heir, as will appear from the document here annexed :

Richert's
Heirs
v.
Stoll and
Richert.

"And whereas my said son has afterwards been obliged to run himself into debt again, which debt I have paid at his request, and that I might not see him perishing in gaol, or sinking under the weight of criminal prosecutions, and which amount to a sum of Rds. 1460, as per vouchers and receipts annexed ;

"It is therefore my earnest will and unalterable desire that, after my death, not only the solemn engagement given by my late son, but also the other debts which I paid for him, and which now amount together to a sum of Rds. 6460, shall be of full force and effect ; and I request my respective executors and the guardians of my minor children to take care that they do not suffer any loss thereby, and that the sum be carried into my estate as one of the assets thereof.

"I do further desire and stipulate that, should his child make claim as the representative of my late son, the surplus above the Rds. 6460 be awarded to him, after all the other legal heirs shall have received the said amount ; but should the inheritance turn out to be less, that he can have no claim whatever."

The engagement by the said Andreas Richert in the said codicil mentioned was as follows :—

"I, the undersigned, do acknowledge and declare hereby to the whole of my family, that during the last years of my minority, I have received from time to time from my dear and beloved father, Andreas Richert, sr., different sums of money (which have now accumulated to an amount of f 15,000), in order to pay sundry debts, which I was under the necessity to contract, on account of the unfortunate circumstances in which I was placed, but that I am perfectly inclined, and that I do bind myself hereby, after the decease of my dear father, to have the said amount of f 15,000, so advanced to me, deducted from my inheritance, without any objection or contradiction, in order that my family or other heirs shall not suffer any loss thereby."

The said testator died on the 22d May, 1830, without having in any manner altered or revoked the said codicil.

The said A. Richert, jr., son of the said testator, died in the lifetime of his father, on the 5th June, 1829, leaving one son, Andreas, now a minor, him surviving.

The said sum of Rds. 6460 was never repaid by the said Andreas Richert, jr., to the said testator.

Richert's
Heirs
F.
Stoll and
Richert.

The defendant, as executor, appointed by the testator in his said will, administered and realised his estate, the net proceeds of which amounted to £2008.

The plaintiffs, being the other heirs of the testator, maintained that, as, if this sum was equally divided among them in shares, according to the terms of the will, the share of each of them would be less than Rds. 6460, the codicil barred the testator's said minor grandchild from all claim for any share in the testator's estate, as representing his deceased father.

The defendant, as guardian of the said minor, claimed an equal share for him.

The Attorney-General, for the plaintiff, maintained that the acknowledgment or discharge granted by Andreas Richert, the father of the minor defendant, was valid, and had the effect of discharging his claim for any part of his share of his father's property, if the same should be less than Rds. 6460, and having thereby in his lifetime discharged his claim, the defendant, whose only right is derived from him by representation, is barred by that discharge from now claiming.

De Wet maintained, 1st, that the acknowledgment or discharge had only the effect, in law, of discharging the son's claim in the event of his having survived his father, whereas he predeceased him.

He maintained, 2dly, that if the minor was not barred by the acknowledgment, his claim could not be compensated by any claim now made against him, on account of the debt due by his father to the testator, in respect of the money advanced to him, because the son having died in the lifetime of the testator, his estate was surrendered by the Orphan Chamber and administered as insolvent; consequently, his son, the minor, was not liable for that debt, which could not be set off against his claim under the will, which did not arise to him until his father's debt to the testator was extinguished, at least in so far as the defendant was concerned by the proceedings under the Sequestration of his father's insolvent estate.

The Court gave judgment for the plaintiffs, costs, by consent, to be paid out of the estate, on the ground that the acknowledgment by the defendant's father founded on was a discharge *pro tanto* of his claim under the will, and consequently, that of all deriving right through him.*

* Consul. Children of Fehrsen v. Widow Horak, 8th September, 1837.

ESTON v. HITZEROTH AND LEEWNER.

[19th June, 1832.]

Promissory Note.—Notice of Dishonour by Maker may be given to Indorser on the very day the Note is due.

In this case, in which neither of the defendants, who were the maker and indorser of a promissory note, appeared, the plaintiff proved from the protest that payment had been demanded from and refused by the maker, on the day on which it became due, and that, on the same day, notice of dishonour was given to the indorser, who refused to receive the notice on that day.

Eston
v.
Hitzeroth
and Leewner.

A doubt was stated on the bench as to the competency of giving notice of dishonour before the whole of the day of payment had expired, but after considering the authorities in Chitty, pp. 365 and 401,

The Court held that the notice, which had been given, was good notice, and gave provisional sentence against both the maker and indorser.

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